

# Big Brother's Little Helpers: Telecommunication Immunity and the FISA Amendment Act of 2008

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1216
II. THE TERRORIST SURVEILLANCE PROGRAM: A BRIEF BACKGROUND .....	1219
A. <i>The Story Breaks</i> .....	1219
B. <i>Challenges to the Program: Setting the Stage for the Telecommunication Immunity Debate</i> .....	1221
1. <i>Taking Warrantless Wiretapping to Court</i> .....	1221
III. AMENDING FISA: THE TELECOMMUNICATIONS IMMUNITY DEBATE .....	1226
A. <i>Past Abuses and the Passage of the FISA Act of 1978</i> .....	1227
B. <i>Congressional Debate over FISA and Telecommunications Immunity</i> .....	12299
1. <i>The Protect America Act and President Bush's Call for Telecom Immunity</i> .....	12299
2. <i>The Telecommunication Immunity Debate in Congress and the Passage of the FISA Amendment Act of 2008</i> .....	1230
C. <i>The FISA Amendment Act of 2008</i> .....	1233
IV. LITIGATION DEVELOPMENT: CHALLENGING THE 2008 FISA AMENDMENT ACT .....	1235
A. <i>Elimination of Plaintiffs' First and Fourth Amendment Claims</i> .....	1237
B. <i>Separation of Powers</i> .....	1239
C. <i>Due Process</i> .....	1241
V. TAKING A STAND: WHY TELECOMMUNICATIONS IMMUNITY IS CONSTITUTIONAL .....	1243
A. <i>Denial of First and Fourth Amendment Claims</i> .....	1244
B. <i>Separation of Powers</i> .....	1246
C. <i>Due Process</i> .....	1249
D. <i>Judge Walker's Order</i> .....	1252

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VI. WHERE TO GO FROM HERE.....	1255
VII. CONCLUSION .....	1259

### I. INTRODUCTION

In the 2008 blockbuster *The Dark Knight*, Batman battles the deranged Joker in a fight for the soul of Gotham. As the movie nears its conclusion, Batman, through Wayne Enterprises, develops a telephone surveillance system in order to locate, and eventually stop, the Joker. The system is not without its detractors, however. Once Batman reveals his invention to Lucius Fox, the CEO of Wayne Enterprises, Fox declares that the machine is “too much power for one man” and threatens to resign from his post.<sup>1</sup> Nevertheless, Fox eventually agrees to help Batman find the Joker. Once Batman finds and captures the Joker, Fox destroys the surveillance machine.

The surveillance sequence from the most recent edition of Batman serves as one of the many illustrations that electronic surveillance is still a popular topic even though the National Security Agency’s (NSA) Terrorist Surveillance Program (TSP), in its original form, has not been reauthorized since January of 2007.<sup>2</sup> Although a fictitious example, the surveillance subplot from *The Dark Knight* does reveal a variety of the underlying issues regarding electronic surveillance in the twenty-first century. At a surface level, the movie sets forth basic arguments for and against this type of surveillance. The Joker was an extreme threat and the surveillance system did help Batman catch him.<sup>3</sup> As the character of Fox argues, however, the program represented a serious intrusion on the privacy of the citizens of Gotham.<sup>4</sup> Perhaps on a deeper level, the movie reveals that it is not only the government, or in this case Batman, that citizens must worry about. After all, without the help and resources of Wayne Enterprises, Batman’s surveillance would have never been possible. Similarly, the warrantless wiretapping that occurred as part of the TSP required the assistance of various telecommunications companies.<sup>5</sup>

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<sup>1</sup> THE DARK KNIGHT (Warner Bros. Pictures 2008).

<sup>2</sup> In a January 17, 2007, letter to Chairman Patrick Leahy and Senator Arlen Specter of the Senate Committee on the Judiciary, Attorney General Alberto Gonzales informed the Senators that “the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.” Letter from Alberto Gonzales, U.S. Attorney General, to Chairman Patrick Leahy and Senator Arlen Specter (Jan. 17, 2007), available at [http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales\\_Letter.pdf](http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf) [hereinafter Gonzales Letter].

<sup>3</sup> THE DARK KNIGHT (Warner Bros. Pictures 2008).

<sup>4</sup> *Id.*

<sup>5</sup> Eric Lichtblau, *Role of Telecom Firms in Wiretaps Is Confirmed*, N.Y. TIMES, Aug. 24, 2007, at A13 [hereinafter Lichtblau, *Role of Telecom Firms*] (“The Bush

When *New York Times* reporters James Risen and Eric Lichtblau uncovered the warrantless surveillance program in December of 2005, the NSA's wiretapping program faced various forms of political and legal scrutiny.<sup>6</sup> By 2006, both the government and telecommunication companies' actions were being challenged in federal court.<sup>7</sup> With public pressure and criticism building, President Bush chose not to reauthorize the TSP on January 17, 2007.<sup>8</sup> Furthermore, as Congress attempted to revise the Foreign Intelligence Surveillance Act of 1978 (FISA), the Bush Administration pushed for Congress to grant immunity to the telecommunications companies that had participated in the TSP.<sup>9</sup>

In July 2008, Congress passed the Foreign Intelligence Surveillance Act of 1978 Amendment Act of 2008 (FISAAA).<sup>10</sup> The bill reformed the FISA system, placing both legislative and judicial checks on federal electronic surveillance.<sup>11</sup> Most notably, the Act created legal immunity for telecommunications companies.<sup>12</sup> The legislation gives the Attorney General the authority to "certif[y] to the district court" that a person had provided assistance to the intelligence community during the period of the TSP.<sup>13</sup>

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administration has confirmed for the first time that American telecommunications companies played a crucial role in the National Security Agency's domestic eavesdropping program after asserting for more than a year that any role played was a 'state secret.'").

<sup>6</sup> See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see also *infra* Part II.

<sup>7</sup> See, e.g., *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006) (District Court Judge Anna Diggs Taylor finding the surveillance program unconstitutional); Press Release, Electronic Frontier Foundation, *EFF Sues AT&T to Stop Illegal Surveillance*, (Jan. 31, 2006), <http://www.eff.org/press/archives/2006/01/31> [hereinafter *EFF Sues AT&T*].

<sup>8</sup> See Gonzales Letter, *supra* note 2.

<sup>9</sup> Ellen Nakashima, *Roadblock for Telecom Immunity: Senate Judiciary Leaders Resist Leniency for Surveillance*, WASH. POST, Nov. 1, 2007, at A6.

<sup>10</sup> Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at A1 [hereinafter Lichtblau, *Senate Approves Bill*].

<sup>11</sup> See Foreign Intelligence Surveillance Act of 1978 Amendment Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (to be codified at 50 U.S.C. § 1801) ("An Act [t]o amend the Foreign Intelligence Surveillance Act of 1978 to establish a procedure for authorizing certain acquisitions of foreign intelligence . . .").

<sup>12</sup> Lichtblau, *Senate Approves Bill*, *supra* note 10. Opponents of the bill felt that congressional Democrats had given in to the Bush Administration in passing the bill with the immunity provision. *Id.* In particular, President Obama received criticism from various supporters for deciding to support the legislation after having promised in his primary campaign to fight new FISA legislation. James Risen, *Obama Voters Protest His Switch on Telecom Immunity*, N.Y. TIMES, July 2, 2008, at A14.

<sup>13</sup> 50 U.S.C.A. § 1885a (West 2008).

Upon such a certification, and with limited judicial review, FISAAA then requires the district court to dismiss the civil action.<sup>14</sup> With Congress passing the FISA Amendment granting telecommunication immunity, the question has turned to FISAAA's legitimacy. Telecommunications companies, with certification from the Attorney General, have moved for dismissal in suits brought against them for past surveillance activity.<sup>15</sup> Civil liberties groups have already challenged the statute's constitutional validity in federal court.<sup>16</sup>

This Note examines the aftermath of the NSA's Terrorist Surveillance Program, focusing on the legislation and litigation that has occurred as a direct result of the program. In particular, the Note unpacks the controversy surrounding the Foreign Intelligence Surveillance Act of 1978 Amendment Act of 2008,<sup>17</sup> including the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation's (EFF) litigation challenging the 2008 Act.<sup>18</sup> Part II of this Note traces the history of the TSP, and the fallout of its media exposure, leading to the debate over telecommunication immunity. Part III explores the debates over immunity that eventually led Congress to pass FISAAA, which included provisions granting telecommunication immunity. Part IV addresses the litigation challenging the 2008 amendment, highlighting the arguments against the constitutionality of telecommunication immunity. Part V highlights the arguments for FISAAA's constitutionality and ultimately concludes that federal courts should uphold the 2008 FISA

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<sup>14</sup> *Id.*

<sup>15</sup> United States' Notice of Motion to Dismiss or, in the Alternative, for Summary Judgment, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009) No. 06-1791 [hereinafter United States' Notice of Motion to Dismiss].

<sup>16</sup> Bob Egelko, *New Suit on Wiretap Defense*, S.F. CHRON., Oct. 18, 2008, at B3 ("Civil liberties groups started a legal challenge Friday to the new federal law designed to dismiss their wiretapping suits against telecommunications companies . . .") [hereinafter Egelko, *New Suit*].

<sup>17</sup> See 50 U.S.C.A. § 1885a (West 2008) (providing the requirements for immunity from civil action for assistance to the intelligence community based on Attorney General certification).

<sup>18</sup> Various plaintiffs, including the ACLU and EFF, have brought civil actions against a number of telecommunications carriers for assisting the government in the terrorist surveillance program. *Recent Legislation: Congress Grants Telecommunication Companies Retroactive Immunity from Civil Suits for Complying with NSA Surveillance Terrorist Program*, 122 HARV. L. REV. 1271, 1271 (2009) [hereinafter *Recent Legislation*] ("After this information [regarding the TSP] became public, over forty lawsuits were filed against a number of telecommunications companies for their alleged role in assisting the TSP; collectively, 'these suits s[ought] hundreds of billions of dollars in damages.'"); see also Egelko, *New Suit*, *supra* note 16. The federal court system's Multi-District Litigation Panel has transferred the cases (approximately forty of them) to the Northern District of California. Electronic Frontier Foundation, NSA Multi-District Litigation, <http://www.eff.org/cases/att> (last visited Nov. 15, 2009).

Amendment as constitutional. Finally, Part VI examines where there is left to go in the controversy over electronic surveillance and suggests that the time has come for each side of the debate to count its victories and move forward.

## II. THE TERRORIST SURVEILLANCE PROGRAM: A BRIEF BACKGROUND

### A. *The Story Breaks*

"Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying . . ." <sup>19</sup> With these words the *New York Times* exposed the TSP that President Bush had put into effect shortly after September 11, 2001. <sup>20</sup> According to the story, "[n]early a dozen current and former officials" provided the *New York Times* with information regarding the warrantless wiretapping. <sup>21</sup> These sources estimated that "about 5,000 to 7,000 people suspected of terrorist ties are monitored at one time . . ." <sup>22</sup> The White House had asked the paper not to publish the article for fear that the publicity would damage the effectiveness of the program. <sup>23</sup>

President Bush took little time to respond to the *New York Times* article. <sup>24</sup> On December 17, 2005, the President delivered a radio address confirming the existence of the surveillance program. <sup>25</sup> Specifically, the

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<sup>19</sup> Risen & Lichtblau, *supra* note 6, at A1.

<sup>20</sup> See Michael C. Miller, *Standing in the Wake of the Terrorist Surveillance Program: A Modified Standard for Challenges to Secret Government Surveillance*, 60 RUTGERS L. REV. 1039, 1039 (2008) ("Disclosed to the public by the *New York Times* in December of 2005, the TSP was designed to intercept international telephone calls and e-mail messages coming into and leaving the United States without court oversight.").

<sup>21</sup> Risen & Lichtblau, *supra* note 6, at A1.

<sup>22</sup> *Id.*; see also Jon D. Michaels, *All The President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 910 (2008) ("Under the so-called Terrorist Surveillance Program . . . the NSA . . . cumulatively sp[ie]d on millions of Americans' telephone calls and email correspondences.").

<sup>23</sup> Risen & Lichtblau, *supra* note 6, at A16. The *New York Times* article did concede that "[s]ome information that administrative officials argued could be useful to terrorists has been omitted." *Id.*

<sup>24</sup> See Peter Baker, *President Says He Ordered NSA Domestic Spying*, WASH. POST, Dec. 18, 2005, at A1 ("President Bush said yesterday that he secretly ordered the National Security Agency to eavesdrop on Americans with suspected ties to terrorists . . .").

<sup>25</sup> The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880, 1881 (Dec. 17, 2005) [hereinafter President's Radio Address].

President stated, "In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations."<sup>26</sup> In admitting the existence of the program, President Bush chastised the media and the government sources that provided information on the program.<sup>27</sup> The President ended his address by emphasizing the effectiveness of the program, saying, "This authorization is a vital tool in our war against the terrorists. It is critical to saving American lives."<sup>28</sup> Furthermore, throughout the address, President Bush highlighted the importance in a post-September 11 world of taking protective measures to thwart terrorism.<sup>29</sup>

Directly following the announcement of the warrantless surveillance, the media turned to the role of telecommunications carriers in the program.<sup>30</sup> On December 24, 2005, the *New York Times* reported, "As part of the program . . . the [NSA] has gained the cooperation of American telecommunications companies to obtain backdoor access to streams of domestic and international communications . . ."<sup>31</sup> The NSA used information that telecommunications companies provided to data mine information such as phone calls and emails to gain intelligence regarding

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* ("[O]ur enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.").

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1880–81. Two days after President Bush's radio address, Attorney General Gonzales held his own press release supplementing the President's message on the wiretapping program. Alberto Gonzales, Attorney General, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, (Dec. 19, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-1.html>. Gonzales focused on the "legal underpinnings" of the program, arguing that the program was authorized both through legislation passed after September 11 and the Constitution. *Id.* General Michael Hayden added, "Our purpose here is to detect and prevent attacks. And the program in this regard has been successful." *Id.*

<sup>30</sup> See Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005, at A1 [hereinafter Lichtblau & Risen, *Spy Agency Mined*].

<sup>31</sup> *Id.* The article noted that there was a traditional relationship between government intelligence and communications firms, "[b]ut the N.S.A.'s backdoor access to major telecommunications switches on American soil with the cooperation of major corporations represents a significant expansion of the agency's operational capability . . . ." *Id.* The story also stressed that the amount of information harvested by the program was much greater than originally reported. *Id.*

potential terrorists' threats.<sup>32</sup> Initially, the Bush administration refused to comment or provide information on the role of telecommunications companies in the program.<sup>33</sup> Thus, by late December of 2005, both the TSP and the assistance of telecommunications companies were in the public spotlight, opening the door to both judicial and legislative scrutiny.

### *B. Challenges to the Program: Setting the Stage for the Telecommunication Immunity Debate*

Following the media's disclosure of the TSP, a number of challenges to the program commenced. In the press, both proponents and opponents of the TSP were vocal in giving their opinions of the surveillance program.<sup>34</sup> Various congressional leaders, from both the Republican and Democratic Parties, voiced concerns regarding President Bush's actions and the lack of congressional and judicial oversight of the program.<sup>35</sup> Of particular importance, civil liberties groups and other concerned parties began challenging the constitutionality of the TSP in federal courts.<sup>36</sup>

#### *1. Taking Warrantless Wiretapping to Court*

While the TSP has been challenged in numerous courts, the success of such challenges has been limited.<sup>37</sup> The most successful challenge to date occurred in the Eastern District of Michigan, where Judge Anna Diggs

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<sup>32</sup> Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1 ("The National Security Agency has been secretly collecting the phone call records of tens of millions of Americans, using data provided by AT&T, Verizon and BellSouth . . .").

<sup>33</sup> Lichtblau & Risen, *Spy Agency Mined*, *supra* note 30, at A12.

<sup>34</sup> Compare, e.g., Editorial, *Spies, Lies and Wiretaps*, N.Y. TIMES, Jan. 29, 2006, at C15 (casting all potential justifications for the wiretapping program as inherently deceitful), with, e.g., Editorial, *Thank You For Wiretapping*, WALL ST. J., Dec. 20, 2005, at A14 ("We're glad Mr. Bush and his team are forcefully defending their entirely legal and necessary authority to wiretap enemies seeking to kill innocent Americans.").

<sup>35</sup> Baker, *supra* note 24, at A12. Senator Arlen Specter was particularly vocal in his criticism of the administration, calling the actions "inappropriate" and promising to conduct hearings into the abuse. *Id.*

<sup>36</sup> See, e.g., *ACLU*, 438 F. Supp. 2d at 782; Electronic Frontier Foundation, *supra* note 7.

<sup>37</sup> Although no case has ultimately held the TSP unconstitutional, or its participants civilly or criminally liable, multiple challenges to the court are still pending. Electronic Frontier Foundation, *NSA Spying*, <http://www EFF.org/issues/nsa-spying> (outlining EFF's litigation against the government and telecommunication companies for government spying).

Taylor determined the TSP to be unconstitutional.<sup>38</sup> In *American Civil Liberties Union v. National Security Agency*, the plaintiffs, a group of people who regularly communicated with people from the Middle East regarding matters such as “journalism, the practice of law, and scholarship,” argued that the TSP violated constitutional speech and privacy rights.<sup>39</sup> In response, the government claimed that the state secrets doctrine barred the plaintiffs’ suit because any potential suit would require exposure of information “detrimental to national security.”<sup>40</sup> Judge Taylor rejected the defendant’s argument,<sup>41</sup> and furthermore, found the TSP unconstitutional in violation of both the First and Fourth Amendments.<sup>42</sup> In particular, Judge Taylor held, “The wiretapping program . . . has undisputedly been implemented without regard to FISA and . . . has undisputedly violated the Fourth in failing to procure judicial orders as required by FISA, and accordingly has violated the First Amendment Rights of these Plaintiffs as well.”<sup>43</sup> Because of her ruling on the TSP’s constitutionality, Judge Taylor granted the plaintiffs’ request for injunction.<sup>44</sup>

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<sup>38</sup> See *ACLU*, 438 F. Supp. 2d at 782.

<sup>39</sup> *Id.* at 758.

<sup>40</sup> *Id.* at 758–59. The state secrets doctrine is an evidentiary rule preventing disclosure of information that may harm the United States’ national security interests. *Id.* at 759. The state secrets doctrine played a large role in the Bush Administration and Justice Department’s defenses to a variety of national security related civil claims. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1250–51, 1308 (2007) (arguing that the Bush Administration’s use of the state secrets doctrine, while pervasive, did “not depart significantly from its past usage”).

<sup>41</sup> *ACLU*, 438 F. Supp. 2d at 765. The court found that the state secrets defense did apply to the plaintiff’s data mining claim. *Id.* Nevertheless, the court rejected the state secrets argument with regard to the TSP, finding that plaintiffs had a “*prima facie* case based solely on Defendants’ public admissions regarding the TSP.” *Id.*

<sup>42</sup> *Id.* at 782. Unsurprisingly, Democrats and civil liberties organizations applauded Judge Taylor’s ruling, while the Bush Administration and fellow Republicans denounced the opinion as a product of a liberal judge. Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. TIMES, Aug. 18, 2006, at A1. Attorney General Gonzales stated following the decision, “[administration officials] believe very strongly that the program is lawful . . . . We’re going to do everything we can do in the courts to allow this program to continue.” *Id.*

<sup>43</sup> *ACLU*, 438 F. Supp. 2d at 775–76. Furthermore, Judge Taylor also found that the surveillance program violated statutory law and the separation of powers doctrine. *Id.* at 782.

<sup>44</sup> *Id.* (“For all of the reasons outlined above, this court . . . holds that the TSP violates the [Administrative Procedure Act]; the Separation of Powers doctrine; the First and Fourth Amendments of the United States Constitution; and the statutory law . . . The Permanent Injunction of the TSP requested by Plaintiffs is granted . . . .”).



The victory for opponents of the TSP was short-lived, however. The Sixth Circuit reversed and remanded Judge Taylor's ruling, finding that the plaintiffs did not have standing for their claims.<sup>45</sup> In reaching this determination, the Sixth Circuit held that the plaintiffs' claims lacked the component of injury.<sup>46</sup> Judge Alice M. Batchelder explained, "[T]he injury that would support a declaratory judgment action (i.e., the anticipated interception of communications resulting in harm to the contacts) is too speculative, and the injury that is imminent and concrete (i.e., the burden on professional performance) does not support a declaratory judgment action."<sup>47</sup> In explaining why each claim lacked standing, the court took issue with the causation element and held the state secrets doctrine was applicable to certain claims.<sup>48</sup> The Supreme Court denied certiorari on February 19, 2008.<sup>49</sup>

Although there have been other direct challenges to government actions,<sup>50</sup> civil liberty organizations and other plaintiffs have also challenged the cooperative actions of telecommunications carriers involved with the TSP.<sup>51</sup> On January 31, 2006, the EFF began a class action lawsuit against

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<sup>45</sup> *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 648 (6th Cir. 2007) ("Because we cannot find that any of the plaintiffs have standing for any of their claims, we must vacate the district court's order and remand for dismissal of the entire action.").

<sup>46</sup> *Id.* at 657; see also Amy Goldstein, *Lawsuit Against Wiretaps Rejected*, WASH. POST, July 7, 2007, at A5 ("Judge Alice M. Batchelder . . . concluded that the plaintiffs . . . do not have the legal standing to bring the lawsuit. She said the plaintiffs could not show that they had been injured directly by the surveillance.").

<sup>47</sup> *ACLU*, 493 F.3d at 657.

<sup>48</sup> For the First Amendment cause of action, the Sixth Circuit found a lack of causation between the government action and the injuries claimed. *Id.* at 670 ("The plaintiffs have not shown a sufficient causal connection between the complained-of conduct (i.e., the absence of a warrant or FISA protection) and the alleged harm (i.e., the inability to communicate)."). The court found a lack of standing for the Fourth Amendment claim because the state secrets doctrine prevented the plaintiffs from presenting any evidence that their communications were actually intercepted. *Id.* at 673 ("The plaintiffs do not, and cannot, assert that any of their own communications have ever been intercepted. Instead, they allege only a belief that their communications are being intercepted . . .") Finally, with regard to the separation of powers doctrine, the court determined that the record "does not permit the kind of particularized analysis that is required to determine causation." *Id.* at 674.

<sup>49</sup> *ACLU v. Nat'l Sec. Agency*, 128 S. Ct. 1334, 1334 (2008).

<sup>50</sup> See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (finding that absent sealed documents, that were protected under the state secrets doctrine, the plaintiff could not establish standing unless FISA preempted the state secrets doctrine).

<sup>51</sup> Electronic Frontier Foundation, *supra* note 37.

AT&T for assisting the NSA in the wiretapping program.<sup>52</sup> AT&T moved for dismissal based on a lack of standing, and the United States, moving to intervene as a defendant, also sought dismissal.<sup>53</sup> Judge Walker of the Northern District of California rejected dismissing the case under the state secrets doctrine, stating, "If the government's public disclosures have been truthful, revealing whether AT&T has received a certification to assist in monitoring communication content should not reveal any new information . . . . [I]f the government has not been truthful, the state secrets privilege should not serve as a shield . . . ."<sup>54</sup> AT&T appealed Judge Walker's decision to the Ninth Circuit; however, the Ninth Circuit remanded the case in light of the FISA Amendment Act of 2008.<sup>55</sup>

A number of other civil actions, in addition to *Hepting v. AT&T Corp.*, were filed against telecommunications companies in May 2006.<sup>56</sup> On the authority of the Multi-District Litigation Panel of the federal court, approximately forty cases regarding telecommunications companies and NSA surveillance were transferred to the Northern District of California.<sup>57</sup> The ACLU and the EFF are joint counsel in the multi-jurisdiction telecommunications lawsuits.<sup>58</sup> Nevertheless, because of congressional action, such lawsuits are in jeopardy.<sup>59</sup> Judge Walker, in June of 2009, granted the government's motion to dismiss the suits.<sup>60</sup> The ACLU and EFF are planning to appeal this decision to the Ninth Circuit.<sup>61</sup> Therefore, to fully

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<sup>52</sup> *Id.* ("The Electronic Frontier Foundation (EFF) filed a class-action lawsuit against AT&T Tuesday, accusing the telecom giant of violating the law and the privacy of its customers by collaborating with the National Security Agency (NSA) in its massive and illegal program to wiretap and data-mine Americans' communications.").

<sup>53</sup> *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006).

<sup>54</sup> *Id.* at 996. Judge Walker did recognize the possibility that the defendants would appeal, and therefore, had the court certify the order so that the parties could apply for immediate appeal. *Id.* at 1011.

<sup>55</sup> *Hepting v. AT&T Corp.*, 539 F.3d 1157, 1157 (9th Cir. 2008). For more information on FISAAA, see *infra* Part III.

<sup>56</sup> Electronic Frontier Foundation, *supra* note 18.

<sup>57</sup> *Id.* In addition to AT&T Corp., telecommunications defendants include Verizon Communications, BellSouth, Sprint Nextel, T-Mobile, Comcast, and Cingular Wireless. *Id.*; see also Cauley, *supra* note 32, at A1.

<sup>58</sup> Egelko, *New Suit*, *supra* note 16, at B3.

<sup>59</sup> See *infra* Part III.

<sup>60</sup> *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009).

<sup>61</sup> Press Release, EFF and ACLU Planning to Appeal Dismissal of Dozens of Spying Cases, Electronic Frontier Foundation, June 3, 2009,

unravel the story of telecommunications litigation, one must further explore the buildup to the FISA Amendment Act of 2008.

## *2. The Surveillance Program Ends; the Telecommunication Immunity Debate Begins*

On January 17, 2007, Attorney General Alberto Gonzales sent a letter to Chairman Patrick Leahy and ranking minority member Arlen Specter of the Senate Committee of the Judiciary.<sup>62</sup> In the letter, the Attorney General notified the Senators that President Bush had decided not to reauthorize the TSP.<sup>63</sup> The letter emphasized that the Administration had begun, even before public disclosure of the program, to explore options for FISA court approval.<sup>64</sup> According to the letter, on January 10, a judge of the Foreign Intelligence Surveillance Court issued orders allowing the government to target communications when probable cause exists to believe that one of the communicates belongs to a recognized terrorist organization.<sup>65</sup> With this order in place, President Bush felt that reauthorization of the TSP was no longer necessary.<sup>66</sup>

With the TSP coming to an end, the debate over telecommunication immunity began to accelerate. Although the *New York Times* and other media outlets had already discussed the role of telecommunications in the surveillance program shortly after initial disclosure of the program,<sup>67</sup> it was not until August of 2007 that the Bush Administration confirmed the role of

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<http://www.eff.org/press/archives/2009/06/03> [hereinafter EFF and ACLU Planning to Appeal].

<sup>62</sup> Gonzales Letter, *supra* note 2; Austin Anderson, *The Terrorist Surveillance Program: Assessing the Legality of the Unknown*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 387, 388 (2007).

<sup>63</sup> Gonzales Letter, *supra* note 2.

<sup>64</sup> *Id.* ("In the spring of 2005—well before the first press account disclosing the existence of the [TSP]—the Administration began exploring options for seeking such FISA Court approval."). Despite the decision to end the program and seek court approval, controversy still existed due to the Bush Administration's refusal to provide a detailed account regarding the TSP. Caitlin Thistle, *A First Amendment Breach: The National Security Agency's Electronic Surveillance Program*, 38 SETON HALL L. REV. 1197, 1199 (2008).

<sup>65</sup> Gonzales Letter, *supra* note 2.

<sup>66</sup> Despite effectively ending the TSP, the Attorney General's office still ardently maintained that "the Terrorist Surveillance Program fully complies with the law." *Id.*

<sup>67</sup> See Katherine Shrader, *Spy Chief Reveals Classified Details*, S.F. GATE, August 22, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/08/22/national/w130303D94.DTL> (discussing how McConnell revealed telecommunications companies' role in FISA and his argument for telecommunication immunity).

telecommunications industry in the TSP.<sup>68</sup> Specifically, Mike McConnell, the Director of National Intelligence, stated, "Under the president's program, the terrorist surveillance program, the private sector had assisted us, because if you're going to get access, you've got to have a partner."<sup>69</sup> Hand in hand with this admission came a call from the Bush Administration for legal immunity for the telecommunications companies involved.<sup>70</sup> Additionally, McConnell's statements came at the same time Congress was threatening to rework legislation regarding the government's surveillance authority and considering the issue of telecommunication immunity.<sup>71</sup>

With the TSP terminated, the telecommunications litigation already in progress, and the government admitting the role of telecommunications companies in the program, by midyear 2007 the stage was set for the congressional debate on telecommunications immunity and FISA law. Nevertheless, with forces such as the Bush Administration and civil liberties organizations applying considerable pressure, the issue of retroactive immunity was clearly divisive in Congress's attempt to revise the Foreign Intelligence Surveillance Act of 1978.

### III. AMENDING FISA: THE TELECOMMUNICATIONS IMMUNITY DEBATE

Understanding the FISA Amendment requires first understanding the context in which the legislation took place. Reaching FISAAA, which included telecommunication immunity, required a long political battle and a great deal of compromise.<sup>72</sup> Even after a drawn out legislative process, many

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<sup>68</sup> Lichtblau, *Role of Telecom Firms*, *supra* note 5, at A13.

<sup>69</sup> *Id.* This statement was made in an interview to the *El Paso Times*. Shrader, *supra* note 67.

<sup>70</sup> Lichtblau, *Role of Telecom Firms*, *supra* note 5, at A13. In the same interview, McConnell emphasized the importance of granting retroactive immunity to telecommunications companies. *Id.* McConnell justified the immunity in part to protect the financial well-being of the telecommunications companies, saying, "If you play out the suits at the value they're claimed . . . it would bankrupt these companies." *Id.*

<sup>71</sup> Shrader, *supra* note 67. Congress had already legislated to give the President broader wiretapping authority (in comparison to the original FISA authority) and to give telecommunications companies some immunity in helping the government with surveillance, but this immunity was not retroactive. Lichtblau, *Role of Telecom Firms*, *supra* note 5, at A13. Congressional Democrats in the summer of 2007 were threatening to rework the new legislation because they felt it gave the Executive branch too much power. *Id.*

<sup>72</sup> Eric Lichtblau & David Stout, *House Passes Bill on Federal Wiretapping Powers*, N.Y. TIMES, June 21, 2008, <http://www.nytimes.com/2008/06/21/washington/21fiscnd.html>. The *New York Times* reported, "The House on Friday overwhelmingly approved a bill overhauling the rules on the government's wiretapping powers and

were still unsatisfied that telecommunication immunity became law.<sup>73</sup> Examining the passage of the 2008 Amendment begins by looking back at FISA law in its original form. After examining the FISA Act of 1978, one can turn to the debate that occurred after public discovery of the TSP. Finally, engaging the legislative amendment itself sets the scene for the judicial battles that the FISA Amendment Act of 2008 has created.

### *A. Past Abuses and the Passage of the FISA Act of 1978*

In December of 1974, Seymour Hersh of the *New York Times* published an article accusing the Central Intelligence Agency of domestic spying.<sup>74</sup> The response to Hersh's article was substantial, as both houses of Congress established committees to investigate governmental abuse under the leadership of Senator Frank Church and Representative Otis Pike.<sup>75</sup> The Church Committee's results were profound.<sup>76</sup> Specifically, in 1976 the Committee concluded that since 1956, the government had "conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association."<sup>77</sup> With such a scathing conclusion, the Church Committee paved the way for legislative action.

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conferring what amounts to legal immunity to the telephone companies." *Id.* Nevertheless, "[t]he vote followed months of wrangling and came a day after Democratic and Republican leaders reached agreement." *Id.*

<sup>73</sup> Representative Nadler of New York claimed the amendment "abandons the Constitution's protections and insulates lawless behavior from legal scrutiny." *Id.*

<sup>74</sup> Seymour Hersh, *Huge C.I.A. Operation Reported in U.S. Against Anti-War Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at A1; see also Gerald K. Haines, *Looking for a Rogue Elephant: The Pike Committee Investigations and the CIA*, at 81, <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/pdf/v42i5a07p.pdf> (providing a historical account of congressional investigations into government agencies following the media's discovery of domestic spying). There are strong similarities between the settings of Hersh's article and Risen's story uncovering the TSP thirty years later. Compare Hersh, *supra*, at A1, with Risen & Lichtblau, *supra* note 6, at A1.

<sup>75</sup> Haines, *supra* note 74, at 81. The two committees did play different roles, with the Church Committee focusing on the domestic spying allegations. *Id.* ("While the Church Committee centered its attention on the more sensational charges of illegal activities by the CIA and other components of the IC, the Pike Committee set about examining the CIA's effectiveness and its costs to taxpayers.").

<sup>76</sup> See Diane Carraway Piette & Jesselyn Radack, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall,"* 17 STAN. L. & POL'Y REV. 437, 441–42 (2006) ("[T]he comprehensive 1976 Church Committee Report, with its shocking revelations of surveillance programs targeting American citizens . . . had a chilling effect on warrantless electronic wiretaps.").

<sup>77</sup> *Id.* at 441 n.22 (quoting staff reports from the Church Committee).

In light of the Church Committee report, Congress took decisive action to pass an electronic surveillance bill. Bill proposals were introduced in both the Senate and the House of Representatives on May 18, 1978, regarding potential electronic surveillance law.<sup>78</sup> Each House passed Senate Bill 1566, which eventually became the FISA law, by substantial margins.<sup>79</sup> President Carter signed the Foreign Intelligence Act of 1978 into law on October 25, 1978.<sup>80</sup> Through passing FISA, Congress attempted to assure the public and resolve disputes over the proper governmental role in domestic surveillance by establishing a system of checks on the Executive.<sup>81</sup>

The FISA law of 1978 provides for numerous checks on the Executive's electronic surveillance power.<sup>82</sup> Specifically, FISA requires the President and the Attorney General to apply to the Foreign Intelligence Surveillance Court for approval of surveillance.<sup>83</sup> The Foreign Intelligence Surveillance Court consists of eleven judges whom the Supreme Court Chief Justice chooses to designate.<sup>84</sup> In deciding whether to grant an order, judges determine whether there is probable cause to permit surveillance.<sup>85</sup> In addition to judicial checks on electronic surveillance, FISA also requires the executive branch to provide information to Congress regarding targets.<sup>86</sup>

For approximately thirty years the Foreign Intelligence Surveillance Act of 1978 seemed to be an acceptable solution to the issue of electronic surveillance.<sup>87</sup> Nevertheless, once Risen broke the story of President Bush's domestic wiretapping, the surveillance debate began anew. Although revising FISA required Congress to examine various concerns, the major issue

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<sup>78</sup> See S. 1566, 95th Cong. (1978) (enacted).

<sup>79</sup> *Id.* (the Senate passed the bill by a vote of ninety-five-to-one).

<sup>80</sup> See *id.*

<sup>81</sup> Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 158 (2008). The White House had claimed that for reasons of "national security" ordinary Fourth Amendment analysis did not apply in this area. *Id.*

<sup>82</sup> See 50 U.S.C. § 1801 (2000).

<sup>83</sup> *Id.* § 1802(b) ("Applications for a court order under this subchapter are authorized if the President has . . . empowered the Attorney General to approve applications to the court . . . and a judge to whom an application is made may, notwithstanding any other law, grant an order.").

<sup>84</sup> *Id.* § 1803.

<sup>85</sup> *Id.* § 1805. The statute sets forth standards for determining probable cause including whether the person under investigation is an agent of a foreign power. *Id.*

<sup>86</sup> *Id.* § 1803(a)(3).

<sup>87</sup> Rubenfeld, *supra* note 81, at 159. Two circuit courts upheld FISA's constitutionality in this period, and the Supreme Court never addressed FISA directly. *Id.*; see also *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984).

quickly became whether Congress should grant telecommunication immunity.

## B. Congressional Debate over FISA and Telecommunications Immunity

### 1. *The Protect America Act and President Bush's Call for Telecom Immunity*

Even before the Bush Administration had publicly admitted the role of telecommunications companies in the TSP, Congress was working to come up with a twenty-first century solution to the electronic surveillance debate.<sup>88</sup> On August 5, 2007, President Bush signed the Protect America Act into law, which gave broad wiretapping power to the Bush Administration.<sup>89</sup> In particular, the law gave the NSA the power to bypass the FISA court system in conducting electronic surveillance.<sup>90</sup> Additionally, the Protect America Act foreshadowed the telecommunication immunity debate to come, as the law "require[d] telecommunications companies to make their facilities available for government wiretaps, and it grant[ed] them immunity from lawsuits for complying."<sup>91</sup> Nevertheless, the legislation was by no means a permanent solution to the FISA debate as the Protect America Act expired in February of 2008.<sup>92</sup>

As noted above, in August 2007, the Bush Administration revealed the role telecommunications companies played in the TSP and began the push

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<sup>88</sup> Shrader, *supra* note 67; Charlie Savage, *New Law Expands Power to Wiretap Diminishes Oversight of the NSA Spy Program*, BOSTON GLOBE, Aug. 6, 2007, at A1.

<sup>89</sup> Savage, *supra* note 88, at A1. ("[T]he law grants the executive branch even broader warrantless wiretapping powers than the ones Bush said he had a right to exercise under his original program.")

<sup>90</sup> See Juan P. Valdivieso, *Recent Developments: Protect America Act of 2007*, 45 HARV. J. ON LEGIS. 581, 583 (2008) ("By changing the definition of 'electronic surveillance,' the [Protect America Act] removed conduct that would have met the definition of electronic surveillance under the previous version of FISA from the jurisdiction of the FISA Court."). The bill outraged many on the left, particularly civil liberties groups, who "claim[ed] that it gave the government unconstitutionally broad powers to spy on Americans who have no involvement in terrorist activity." *Id.* at 581.

<sup>91</sup> Savage, *supra* note 88, at A5. It is important to note that this immunity grant was not retroactive and did not apply to prior participants in the TSP. *See id.*

<sup>92</sup> *All Things Considered: What Happens If the Protect America Act Expires?* (NPR radio broadcast Feb. 14, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=19055475> (President Bush fought to make the bill permanent and claimed that not doing so was dangerous for the country).

for retroactive immunity.<sup>93</sup> With lawmakers looking to revise the Protect America Act, President Bush renewed his call for telecommunication immunity in October of 2007.<sup>94</sup> President Bush urged that any legislation passed must include telecommunication immunity.<sup>95</sup> The President consistently applied pressure for telecommunication immunity throughout the congressional process and threatened to veto any bill on FISA that did not grant telecommunication immunity.<sup>96</sup>

## *2. The Telecommunication Immunity Debate in Congress and the Passage of the FISA Amendment Act of 2008*

The debate over telecommunication immunity revealed a deep divide in Congress, and especially, among congressional Democrats.<sup>97</sup> The Senate was the first to take legislative action on telecommunication immunity.<sup>98</sup> On February 12, 2008, the Senate passed a bill that would have amended FISA law and granted telecommunication immunity to the companies that had participated in the TSP.<sup>99</sup> Although the final vote on the bill was a convincing 68-to-29, Democratic leaders did introduce a series of amendments to attempt to strip the bill of telecommunication immunity.<sup>100</sup> Senator Christopher Dodd of Connecticut was particularly ardent in his

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<sup>93</sup> Shrader, *supra* note 67; *see supra* Part II.B.2.

<sup>94</sup> *Bush Pushes for Telecom Immunity*, USA TODAY, Oct. 10, 2007, [http://www.usatoday.com/news/washington/2007-10-10-bush-eavesdropping\\_N.htm](http://www.usatoday.com/news/washington/2007-10-10-bush-eavesdropping_N.htm).

<sup>95</sup> *Id.* President Bush emphasized that the new bill, with retroactive telecommunication immunity, was needed to “keep the intelligence gap firmly closed.” *Id.*

<sup>96</sup> *Bush Again Demands Telecom Immunity*, CBS NEWS, Feb. 23, 2008, <http://www.cbsnews.com/stories/2008/02/23/national/main3868291.shtml> (“President Bush has made it known repeatedly that, while he demands an update to FISA in order to ensure national security, he also will not sign any law that does not grant protection from lawsuits to the telecoms.”).

<sup>97</sup> *See, e.g.,* Martin Kady II, *Dems Fall Well Short of Stripping Immunity From Spy Bill*, CBS NEWS, Feb. 12, 2008, <http://www.cbsnews.com/stories/2008/02/12/politics/politico/thecrypt/main3821504.shtml>.

<sup>98</sup> Eric Lichtblau, *Senate Passes Bill to Expand U.S. Spying Powers*, N.Y. TIMES, Feb. 12, 2008, <http://www.nytimes.com/2008/02/12/washington/12cnd-fisa.html> [hereinafter Lichtblau, *Senate Passes Bill*].

<sup>99</sup> *Id.* The Senate bill also would have broadened the executive branch’s surveillance powers, allowing intelligence agencies procedures for bypassing court orders. *Id.*

<sup>100</sup> 154 CONG. REC. S775 (daily ed. Feb. 7, 2008) (Senate consideration of a series of amendments to Senate bill 2248 to amend FISA law); *see also* Lichtblau, *Senate Passes Bill*, *supra* note 98.



opposition to telecom immunity.<sup>101</sup> On the Senate floor Dodd argued the grand implications of the immunity decision:

Much more than a few companies and a few lawsuits are at stake. Equal justice is at stake—justice that does not place some corporations outside of the rule of law. Openness is at stake—an open debate on security and liberty, and an end to warrantless wiretapping of Americans.<sup>102</sup>

Others who opposed immunity included presidential contenders Barack Obama and Hillary Clinton.<sup>103</sup>

The idea of granting telecommunication immunity was not well received in the House of Representatives, however. In March 2008 the House passed its own attempt at amending FISA, refusing to grant telecommunication immunity.<sup>104</sup> Instead of granting immunity, the House's bill "would send the issue to a secure federal court and give the companies the right to argue their case using information the administration has deemed to be state secrets."<sup>105</sup> Because of the sharp division between the House bill and Bush's call for telecommunication immunity, many representatives doubted whether an amendment would even be passed during Bush's presidency.<sup>106</sup> The end vote tally revealed how deeply divided the House was on the measure, with a final vote of 213-to-197.<sup>107</sup>

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<sup>101</sup> See 154 CONG. REC. S840–41 (daily ed. Feb. 11, 2008) (statement of Sen. Dodd) (hereinafter Senate debate). Dodd spoke on the Senate floor in opposition of the bill for over twenty hours; see also Lichtblau, *Senate Passes Bill*, *supra* note 98.

<sup>102</sup> Senate debate, *supra* note 101, at S840. He also stressed the importance of judicial scrutiny in the electronic surveillance process. *Id.* at S841 ("There is only one way to settle the issue at stake today. Not simply on trust, not the opinion of a handful of individuals—as much as we may admire or like them—but in our courts.").

<sup>103</sup> Kady, *supra* note 97. Senator Obama would later change his position on telecommunication immunity, drawing the ire of many of his supporters. Risen, *supra* note 12, at A14 ("In recent days, more than 7,000 Obama supporters have organized on a social networking site on Mr. Obama's own campaign Web site. They are calling on Mr. Obama to reverse his decision . . .")

<sup>104</sup> Jonathan Weisman, *House Passes a Surveillance Bill Not to Bush's Liking*, WASH. POST, Mar. 15, 2008, at A2.

<sup>105</sup> *Id.* EFF attorney Kevin Bankston commended the House's approach, stating, "We applaud the House for refusing to grant amnesty to lawbreaking telecoms, and for passing a bill that would allow our lawsuit against AT&T to proceed fairly and securely." Press Release, Electronic Frontier Foundation, EFF Applauds House Passage of Surveillance Bill with No Telecom Immunity (Mar. 14, 2008), <http://www.eff.org/press/archives/2008/03/14>.

<sup>106</sup> Weisman, *supra* note 104, at A2. Senate Majority Leader Harry Reid called on the Bush Administration to begin a process of compromise on the issue. *Id.*

<sup>107</sup> *Id.*

Despite House pessimism regarding the passage of a FISA amendment, by the summer of 2008, Congress had reached a compromise.<sup>108</sup> In June of 2008, facing continued pressure from the White House, House Democratic leaders negotiated with Republicans to draft a new form of the FISA Amendment.<sup>109</sup> In exchange for granting telecommunication immunity, House Democrats required the inspectors general of multiple intelligence agencies to review the program and also emphasized in the bill that FISA was the exclusive way for the executive to conduct wiretapping surveillance.<sup>110</sup> Many representatives celebrated the compromise, including Michael Arcuri of New York, who touted the legislation as a “bipartisan FISA bill that will help protect our Nation from terrorism, while protecting the civil liberties we, as Americans, hold dear.”<sup>111</sup> Others, however, found the “compromise” bill lacking.<sup>112</sup> Representative McGovern of Maryland opposed the bill because it contained “immunity for telecom companies that may have participated in President Bush’s illegal surveillance” and “fail[ed] to adequately protect the privacy rights of law abiding, innocent American citizens.”<sup>113</sup> Despite a sharply divided Democratic party, the House passed the bill with a vote total of 293-to-129.<sup>114</sup>

With the House’s passage of the FISA amendment, the last major hurdle was cleared. In July of 2008, with a vote once again of 68-to-29, the Senate approved the FISA Amendment Act of 2008.<sup>115</sup> President Bush signed the

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<sup>108</sup> Lichtblau & Stout, *supra* note 72.

<sup>109</sup> *New Wiretap Bill Would Shield Phone Companies: Key Democrats, Republicans Reach Compromise on Security, Privacy*, MSNBC, June 19, 2008, <http://www.msnbc.msn.com/id/25265879/>.

<sup>110</sup> Lichtblau & Stout, *supra* note 72. House Majority Leader Hoyer delivered tempered praise for the bill, stating, “It is the result of compromise, and like any compromise is not perfect, but I believe it strikes a sound balance.” *Id.*

<sup>111</sup> 154 CONG. REC. H5739 (daily ed. June 20, 2008) (statement of Rep. Arcuri). The New York Democrat did not think that “the FISA agreement [was] perfect,” but at the same time noted that “[e]ffective legislation demands bipartisan consensus.” *Id.*

<sup>112</sup> See, e.g., 154 CONG. REC. H5740 (daily ed. June 20, 2008) (statement of Rep. McGovern); Lichtblau & Stout, *supra* note 72.

<sup>113</sup> 154 CONG. REC. H5740 (daily ed. June 20, 2008) (statement of Rep. McGovern). Representative McGovern also took issue with the lag period (seven days) between which the bill allows electronic surveillance to begin before judicial review commences. *Id.* at H5740–41.

<sup>114</sup> Lichtblau & Stout, *supra* note 72. While only one Republican voted against the bill, House Democrats were clearly divided as 105 voted for the bill and 128 voted against. *Id.* In opposing the amendment, the *New York Times* reported that Representative Nadler of New York “called the bill ‘a fig leaf . . . [that] abandons the Constitution’s protections and insulates lawless behavior from legal scrutiny.’” *Id.*

<sup>115</sup> Lichtblau, *Senate Approves Bill*, *supra* note 10, at A1.

law quickly calling its passage “long overdue.”<sup>116</sup> Thus, the FISA Amendment Act of 2008 became law, granting telecommunication immunity to the companies that assisted in the Terrorist Surveillance Program.

### C. *The FISA Amendment Act of 2008*

What then did the FISA Amendment Act of 2008 actually do? Besides granting telecommunication immunity, FISAAA provided the largest update to electronic surveillance law since the original FISA Act of 1978 was passed.<sup>117</sup> Among other adjustments, the Amendment establishes a new process for the Attorney General and Director of National Intelligence to obtain authorization for electronic surveillance of foreign targets.<sup>118</sup> Specifically, the Attorney General and Director of National Intelligence may conduct electronic surveillance on targets outside the United States for up to one year, subject to a variety of limitations.<sup>119</sup>

Additionally, FISAAA creates (and re-established) safeguards for civil liberties. Judicial and congressional oversight of electronic surveillance is a clear emphasis of the FISA Amendment Act of 2008.<sup>120</sup> FISAAA establishes new procedures for submitting applications for surveillance to the Foreign Intelligence Surveillance Court.<sup>121</sup> The federal officer initiating the surveillance is required to present a detailed application for certification to the court justifying the need for electronic surveillance.<sup>122</sup> FISAAA also requires congressional oversight, in the form of semi-annual reports from the

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<sup>116</sup> *Id.* Eric Lichtblau of the *New York Times* described the law as “handing President Bush one more victory in a series of hard-fought clashes with Democrats over national security issues.” *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *See* 50 U.S.C.A. §§ 1881a, 1881b, 1881f (West 2008).

<sup>119</sup> *Id.* § 1881a. The key limitation on electronic surveillance comes in the form of judicial review through the Foreign Intelligence Surveillance Courts. *Id.* Other limitations include the prohibition of targeting people “known at the time of acquisition to be located in the United States.” *Id.*

<sup>120</sup> *See id.* §§ 1881b, 1881f.

<sup>121</sup> *See id.* § 1881b (“The Foreign Intelligence Surveillance Court shall have jurisdiction to review an application and to enter an order approving the targeting of a United States person reasonably believed to be located outside the United States to acquire foreign intelligence information . . .”).

<sup>122</sup> 50 U.S.C.A. § 1881b(b) (West 2008). The Foreign Intelligence Surveillance Court, after reviewing the application then makes a determination whether there is probable cause to believe that the target is outside the United States, and also determines whether the application meets the FISA law limitations. *Id.* § 1881b(c).

Attorney General regarding electronic surveillance.<sup>123</sup> Finally, the Amendment contains a message that FISA is the exclusive means of conducting federal electronic surveillance.<sup>124</sup> This provision, one of the key compromises that the Democrats gained through the legislative process, states that, “this chapter shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted.”<sup>125</sup>

The most important accomplishment, for the present discussion, of the Amendment was the creation of a system of telecommunication immunity.<sup>126</sup> FISAAA’s telecommunication immunity provision establishes a system for the Attorney General to certify to United States district courts that a person or entity provided assistance with electronic surveillance.<sup>127</sup> Once the Attorney General grants such certification, the district court is required to dismiss the action, subject to limited judicial review.<sup>128</sup> The Attorney General has a number of potential justifications for certification.<sup>129</sup> First, the Attorney General may certify a company for telecommunication immunity if the company’s assistance was pursuant to a court order.<sup>130</sup> Second, the Attorney General may provide certification if a company was cooperating with foreign surveillance law.<sup>131</sup> The Attorney General may also certify that a defendant did not provide the assistance alleged.<sup>132</sup> Finally, the FISA Amendment Act of 2008 allows the Attorney General to grant certification to telecommunication companies that assisted the President “beginning on September 11, 2001, and ending on January 17, 2007 . . . .”<sup>133</sup>

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<sup>123</sup> *Id.* § 1881f (requiring the Attorney General “fully inform” congressional intelligence and judiciary committees of electronic surveillance matters every six months).

<sup>124</sup> *Id.* § 1812.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* § 1885a.

<sup>127</sup> 50 U.S.C.A. § 1885a(a) (West 2008).

<sup>128</sup> *Id.* § 1885a(a) (“[A] civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court . . .”).

<sup>129</sup> *Id.* § 1885a(a)(1)–(5).

<sup>130</sup> *Id.* § 1885(a)(1).

<sup>131</sup> *Id.* § 1885(a)(2)–(3).

<sup>132</sup> *Id.* § 1885(a)(5).

<sup>133</sup> 50 U.S.C.A. § 1885a(a)(4)(A)(i) (West 2008). In order to receive such immunity, a service provider must have been acting subject to a written request from a head of the intelligence community and must have been assisting in an effort “designed to detect or prevent a terrorist attack.” *Id.*

Once the Attorney General has provided certification to the district court, there remains a process of judicial review.<sup>134</sup> Specifically, a district court must dismiss a case following Attorney General certification “unless the court finds that such certification is not supported by substantial evidence provided to the court.”<sup>135</sup> In reaching such a determination, the court is allowed to review any “court order, certification, written request, or directive” regarding the certification.<sup>136</sup> Nevertheless, there are limits on government disclosure.<sup>137</sup> If the Attorney General declares that disclosure of documents “would harm the national security of the United States” the court will review such information “in camera and ex parte.”<sup>138</sup>

Empowered with the FISA Amendment Act of 2008, and the procedures the Amendment created, telecommunication companies that had assisted in the TSP could move to dismiss any lawsuits brought against them. Because the executive and legislative branches have already committed to the Amendment, opponents of telecommunication immunity have been left with only one branch of government to turn to: the judiciary.

#### IV. LITIGATION DEVELOPMENT: CHALLENGING THE 2008 FISA AMENDMENT ACT

The FISA Amendment Act of 2008 shifted the focus of the civil liberty organizations’ lawsuits against telecommunication companies. At the time of the amendment, the case had moved to the Ninth Circuit on appeal from the Northern District of California.<sup>139</sup> Because of FISAAA, the Ninth Circuit decided to remand the case to the Northern District of California for further proceedings.<sup>140</sup>

On September 19, 2008, the United States filed a notice with the Northern District of California informing the court that it would move to dismiss the case when the court convened on December 2, 2008.<sup>141</sup> The basis

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<sup>134</sup> See *Id.* § 1885a(b).

<sup>135</sup> *Id.* § 1885a(b)(1).

<sup>136</sup> *Id.* § 1885a(b)(2).

<sup>137</sup> See *Id.* § 1885a(c).

<sup>138</sup> 50 U.S.C.A. § 1885a(c) (West 2008).

<sup>139</sup> See *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006); see also *Hepting v. AT&T Corp.*, 539 F.3d 1157, 1158 (9th Cir. 2008). Judge Walker of the Northern District of California had decided not to dismiss the case based on the government and defendant’s motion regarding the state secrets doctrine. *Hepting*, 439 F. Supp. at 996.

<sup>140</sup> 539 F.3d at 1157 (“In light of the FISA Amendments Act of 2008 . . . we remand this case to the district court. We retain jurisdiction over any further appeals.”).

<sup>141</sup> United States’ Notice of Motion to Dismiss, *supra* note 15, at 2.

for the government's motion to dismiss was the 2008 FISA Amendment Act's grant of telecommunication immunity.<sup>142</sup> Specifically, the government argued that because Attorney General Michael B. Mukaskey submitted a public certification that the claims against the telecommunications carriers fell within the circumstances defined under FISAAA the court should dismiss the civil actions.<sup>143</sup> Furthermore, the government argued that under FISAAA, the Attorney General did not have to reveal his basis for certification because disclosure "would cause exceptional harm to national security."<sup>144</sup>

On October 16, 2008, the ACLU and EFF filed a brief with Judge Walker opposing the United States' motion to dismiss.<sup>145</sup> In the brief, the plaintiffs argue that the FISA Amendment Act of 2008 was unconstitutional and therefore could not be used by the court to dismiss claims against telecommunication carriers.<sup>146</sup> The argument for unconstitutionality has three basic strains.<sup>147</sup> First, the ACLU and EFF argue that Congress cannot

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<sup>142</sup> See 50 U.S.C.A. § 1885a (West 2008) (laying out procedures for implementing the statutory immunity defense).

<sup>143</sup> United States' Notice of Motion to Dismiss, *supra* note 15, at 2–3, 12–14. A critical part of the government's argument was that there was substantial evidence to support the Attorney General's decision. *Id.* As noted above, the FISA Amendment states that a court shall not give the immunity provision effect if the "court finds that such certification is not supported by substantial evidence." 50 U.S.C.A. § 1885a(b)(1). In the notice, the government argued that the court should treat substantial evidence as highly deferential. United States' Notice of Motion to Dismiss, *supra* note 15, at 14 (quoting *Pal v. INS*, 204 F.3d 935, 937 n.2 (9th Cir. 2000) ("We review determinations of the BIA under the highly deferential standard of substantial evidence.")).

<sup>144</sup> United States' Notice of Motion to Dismiss, *supra* note 141, at 15. The FISAAA provides, "If the Attorney General files a declaration . . . that disclosure . . . would harm the national security of the United States, the court shall (1) review such certification . . . and (2) limit any public disclosure concerning such certification . . ." 50 U.S.C.A. § 1885a(c).

<sup>145</sup> Egelko, *New Suit*, *supra* note 16, at B3.

<sup>146</sup> Corrected MDL Plaintiffs' Opposition to Motion of the United States Seeking to Apply 50 U.S.C. § 1885a to Dismiss These Actions at ii–iii, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, No. M:06-cv-01791-VRW (N.D. Cal. Oct. 17, 2008) [hereinafter MDL Plaintiffs' Opposition]. The plaintiffs also argue in the alternative that the Attorney General has not met his burden of substantial evidence, but the focus of the brief was the Constitutional arguments. See *id.* at 36. Additionally, the plaintiffs claim that the secrecy provision in 50 U.S.C. 1885a violates the First Amendment and Article III. *Id.* at 31; see also Egelko, *New Suit*, *supra* note 16, at B3 ("Civil liberties groups . . . [say] the statute violates phone customers' constitutional rights and tramples on judicial authority.").

<sup>147</sup> MDL Plaintiffs' Opposition, *supra* note 146 at ii–iii; MDL Plaintiffs' Reply to Briefs of the Carriers and of the United States Seeking to Apply 50 U.S.C. § 1885a to Dismiss These Actions at ii, *In re Nat'l Sec. Agency Telecomms. Records Litig.* No.

eliminate the plaintiffs' constitutional causes of action under the First and Fourth Amendments.<sup>148</sup> Second, the plaintiffs contend that the telecommunication immunities statute violates the separation of powers.<sup>149</sup> Finally, the plaintiffs assert that the FISA Amendment Act of 2008 violates the Due Process Clause.<sup>150</sup>

#### A. Elimination of Plaintiffs' First and Fourth Amendment Claims

One potential argument against telecommunications immunity alleges that the Attorney General, under FISAAA's approach to immunity, unconstitutionally "den[ies] plaintiffs any judicial remedy whatsoever . . . for their constitutional claims of First and Fourth Amendment violations."<sup>151</sup> The argument stems from the notion in *Marbury v. Madison* that the judiciary serves the role of placing constitutional limits on the other two branches of government.<sup>152</sup> The Supreme Court has explicitly allowed plaintiffs to recover damages for First and Fourth Amendment violations.<sup>153</sup> If the Executive and Congress are able to abolish avenues of judicial relief, then the judiciary will not be able to perform its critical review function.<sup>154</sup> Among the avenues of relief that must be protected are the First and Fourth Amendments to the Constitution.<sup>155</sup>

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M:06-cv-01791-VRW (N.D. Cal. Nov. 20, 2008) [hereinafter MDL Plaintiffs' Reply Briefs].

<sup>148</sup> MDL Plaintiffs' Opposition, *supra* note 146, at 2 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

<sup>149</sup> *Id.* at 13; MDL Plaintiffs' Reply Briefs, *supra* note 147, at 7–16.

<sup>150</sup> MDL Plaintiffs' Opposition, *supra* note 146, at 22.

<sup>151</sup> *Id.* at 2–3.

<sup>152</sup> *Id.* at 3 (citing *Marbury*, 5 U.S. at 176–78).

<sup>153</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered . . .") (citations omitted); *Hartman v. Moore*, 547 U.S. 250, 254 n.2, 256 (2006) (allowing remedy for First Amendment claims under the *Bivens* approach).

<sup>154</sup> MDL Plaintiffs' Opposition, *supra* note 146, at 3 ("As Chief Justice Marshall's opinion in *Marbury* explains, the necessity of a judicial remedy for invasions of individual rights flows inexorably from the Judiciary's essential constitutional function in enforcing the constitutional limitations that circumscribe the actions of the Executive and the Legislature.") (citing *Marbury*, 5 U.S. at 176–78).

<sup>155</sup> *Id.* ("Because of the rule of judicial redressability of constitutional violations, federal courts have the power to grant equitable relief for violations of these constitutional rights.").

The plaintiffs in the telecommunication immunity case point out that when Congress or the Executive has attempted to bypass the Judiciary, the court system has taken action.<sup>156</sup> The brief opposing dismissal states, "When, however, Congress and the Executive have left open no path for adequate judicial review of constitutional claims, the Court has not hesitated to strike down the obstructions to judicial review the political branches have erected."<sup>157</sup> To support this idea the plaintiffs cite the case of *Boumediene v. Bush*.<sup>158</sup> In *Boumediene*, the Supreme Court was faced with two acts of Congress denying habeas corpus review to detainees at Guantanamo Bay.<sup>159</sup> The Court in *Boumediene* held that the detainees were entitled to habeas corpus, reasoning, "If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause."<sup>160</sup>

Underlying the argument that telecommunication immunity eliminates First and Fourth Amendment claims is a more general statement regarding surveillance.<sup>161</sup> Specifically, opponents of telecommunication immunity are likely to believe that surveillance systems, and those who assist such systems, require an unbiased arbitrator to check their power.<sup>162</sup> Plaintiffs opposing the telecommunications industry have argued that telecommunication immunity in combination with general FISA laws "grant[] the Executive the power to compel dismissal of constitutional claims without any judicial determination, either before or after the surveillance, of the facts as to what surveillance is actually occurring or of the constitutionality of the surveillance."<sup>163</sup> Additionally, plaintiffs supported

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<sup>156</sup> See *id.* at 5; see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that prisoners at Guantanamo Bay cannot be denied habeas corpus without invoking the Suspension Clause).

<sup>157</sup> MDL Plaintiffs' Opposition, *supra* note 146, at 5.

<sup>158</sup> *Id.* (citing *Boumediene*, 128 S. Ct. at 2262).

<sup>159</sup> 128 S. Ct. at 2240. The Court was specifically dealing with aliens, designated as enemy combatants, challenging the constitutionality of the Military Commission Act and the Detainee Treatment Act. *Id.*; see also MDL Plaintiffs' Opposition, *supra* note 146 at 5.

<sup>160</sup> 128 S. Ct. at 2262. In reaching this determination, the Court found that Congress did not intend the Detainee Treatment Act to replace habeas corpus procedure. *Id.* at 2266.

<sup>161</sup> See MDL Plaintiffs' Opposition, *supra* note 146, at 13.

<sup>162</sup> See *id.* Plaintiffs also used their brief in opposition to dismiss to once again support their basic claim that the surveillance program, and the telecommunications companies' involvement in the program, violated individuals' constitutional rights. *Id.* at 8 ("Warrantless government surveillance not only violates the Fourth Amendment, it also implicates First Amendment rights.").

<sup>163</sup> *Id.* at 13.



their viewpoints with a 1972 United States Supreme Court case holding that the Fourth Amendment did not allow a decision such as warrantless wiretapping to be left solely to the Executive.<sup>164</sup> Therefore, in order for there to be constitutional accountability, there must be some way for people to take judicial action in support of their constitutional rights.

### B. Separation of Powers

Another potential argument against the FISA Amendment Act of 2008 is that telecommunication immunity violates the separation of powers doctrine.<sup>165</sup> On a basic level, separation of powers requires that one branch of government “cannot interfere with, or encroach on, or exercise the powers of, either of the other[s].”<sup>166</sup> Cindy Cohn, legal director for the EFF, describes the separation of powers argument against telecommunications immunity law, stating, “If Congress can give the executive the power to exclude the judiciary from considering the constitutional claims of millions of Americans . . . then the judiciary will no longer be functioning as a coequal branch of government.”<sup>167</sup> As plaintiffs in the telecommunication immunity litigation argue, FISAAA’s grant of immunity potentially violates the separation of powers on two levels: (1) taking lawmaking power from Congress, and (2) taking the ability to determine facts from the court.<sup>168</sup>

One separation of powers argument against telecommunication immunity is that the law impermissibly delegates lawmaking power away from Congress.<sup>169</sup> Plaintiffs’ counsel in the telecommunication case points to Article I, Section 7 of the Constitution to argue that “any change in

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<sup>164</sup> *Id.* at 7; United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 313 (1972) (“Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.”). The Court in *Keith* did stress the narrowness of its Fourth Amendment holding, refusing to question the appropriateness of surveillance legislation. 407 U.S. at 309.

<sup>165</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 13.

<sup>166</sup> 16 C.J.S. *Constitutional Law* § 215 (2008). While the separation of powers doctrine and the appropriate balance of power between branches are no doubt complex constitutional issues, for the purposes of this Note, the basic inquiry is whether the FISAAA causes one branch to encroach on the power of the others. As Part IV.B will demonstrate, plaintiffs are arguing that such encroachment is occurring in two forms.

<sup>167</sup> Egelko, *New Suit*, *supra* note 16, at B3.

<sup>168</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 13.

<sup>169</sup> MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 7; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1951) (setting forth the “nondelegation doctrine,” which states that Congress cannot delegate lawmaking power to the executive branch).

previously enacted law must be enacted by Congress.”<sup>170</sup> In support of this line of argument, the plaintiffs challenging telecommunication immunity rely heavily on *Clinton v. City of New York*.<sup>171</sup> The *Clinton* Court held that any lawmaking power that allowed the Executive to negate laws for policy reasons violated Article I, Section 7, regardless of congressional intention.<sup>172</sup> Despite this requirement of Congress, the FISA Amendment Act of 2008 leaves the decision of whether or not to give certification for immunity entirely in the discretion of the Attorney General.<sup>173</sup> Specifically, regarding 50 U.S.C.A. § 1885a, plaintiffs state:

Whether or not to file a certification is entirely within the Attorney General’s power. Even where one of the requirements of subsections (a)(1)–(5) is satisfied, he has no duty to file a certification. If the Attorney General does file a certification, then the law changes and section 802 governs the action. If he does not file a certification, section 802 does not apply and the law governing the action remains unchanged.<sup>174</sup>

Therefore, the Attorney General’s own discretion empowers him to change the course of the law.<sup>175</sup>

Another potential separation of powers challenge to the FISAAA is that the law strips the court system of the ability to make factual determinations.<sup>176</sup> This argument is based on Article III of the Constitution,

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<sup>170</sup> MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 7; *see also* U.S. CONST. art. I, § 7.

<sup>171</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 14; *see Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (finding the Line Item Veto Act unconstitutional because “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes”).

<sup>172</sup> 524 U.S. at 445–46 (“The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7. The fact that Congress intended such a result is of no moment.”).

<sup>173</sup> MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 8.

<sup>174</sup> *Id.* Peter Eliasberg of the ACLU summarized opponents’ separation of powers fears, stating “Courts must decide what materials can be kept from the public, not a political appointee like the Attorney General, who may be more interested in protecting a particular Administration than the public’s right to know.” *Congress Cannot Grant Wholesale Immunity to Telecoms; FISA 2008 Act is Unconstitutional, ACLU Tells Court*, COMMONDREAMS.ORG, Oct. 17, 2008, <http://www.commondreams.org/newswire/2008/10/17>.

<sup>175</sup> MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 8; *see* 50 U.S.C.A. § 1885a(a) (West 2008) (placing the decision of whether or not to provide certification within the authority of the Attorney General).

<sup>176</sup> *See* MDL Plaintiffs’ Opposition, *supra* note 146, at 20.

which grants judicial power.<sup>177</sup> The Supreme Court defended Article III power, holding in *United States v. Klein* that Congress may not “prescribe a rule for the decision of a cause in a particular way.”<sup>178</sup> The plaintiffs argue that neither Congress nor the Executive may force the Judiciary into making a particular finding of fact.<sup>179</sup> FISAAA allegedly violates this principle because 50 U.S.C. § 1885a gives the Attorney General the authority to determine if the particular situation meets statutory requirements.<sup>180</sup> The fear is that if the Attorney General can force courts to dismiss actions without judiciary fact-finding, the courts constitutional role, as well as the separation of powers doctrine, will be threatened.<sup>181</sup>

### C. Due Process

A final constitutional argument that opponents of telecommunication immunity have leveled against the FISAAA is that the amendment violates due process.<sup>182</sup> On a fundamental level due process requires “government action resulting in the deprivation of a liberty or property interest to be implemented in a fair manner.”<sup>183</sup> This concept is embedded in the Fifth and Fourteenth Amendments.<sup>184</sup> The plaintiffs’ argument rests on the notion that when the Attorney General grants immunity, through FISAAA procedure, the plaintiff “never receive[s] an adversary adjudication before an unbiased

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<sup>177</sup> U.S. CONST. art. III.

<sup>178</sup> *United States v. Klein*, 80 U.S. 128, 146 (1871). The Court in *Klein* was attempting to assess the rights of property holders who had been hostile to the United States in the Civil War. *Id.* at 136.

<sup>179</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 20 (“The prohibition against directing the courts to make particular findings of fact or particular applications of law to fact applies equally to the Executive as it does to Congress.”).

<sup>180</sup> *Id.* at 21. Plaintiffs do concede that the Attorney General’s decisions are subject to judicial review under a substantial evidence standard. *Id.*; see also 50 U.S.C.A. § 1885a(b)(1). Nevertheless, the plaintiffs argue that this requirement of appellate review is not enough to meet constitutional standards. MDL Plaintiffs’ Opposition, *supra* note 146, at 22.

<sup>181</sup> See MDL Plaintiff’s Opposition, *supra* note 146, at 21–22.

<sup>182</sup> MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 16 (“Due process requires more than what [50 U.S.C. § 1885a] provides.”); see Egelko, *New Suit*, *supra* note 16, at B3 (quoting EFF legal director Cindy Cohn, “Due process requires more than the chance to shadow-box with the government.”).

<sup>183</sup> 16 C.J.S. *Constitutional Law* § 1505 (2008).

<sup>184</sup> U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”). This notion is applied to the states through the Fourteenth Amendment. *Id.* amend. XIV.

decisionmaker empowered to decide facts and law *de novo* . . . .”<sup>185</sup> Similar to the separation of powers challenge, the plaintiffs argue that for the requirement of due process to be met, a court must be able to play a fact-finding role and not simply review the Attorney General’s decisions.<sup>186</sup>

In order to assert their due process rights, the plaintiffs argue that the causes of action against telecommunications carriers are property interests protected under due process.<sup>187</sup> In support of this notion, plaintiffs cite *Logan v. Zimmerman Brush Co.*, a Supreme Court case which states, “[A] cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.”<sup>188</sup> In *Logan*, the Court found that a plaintiff could have a property right in an employment claim.<sup>189</sup> Telecommunication immunity plaintiffs use this precedent to conclude “plaintiffs’ constitutional claims, federal statutory claims, and state law claims are all property interests protected by due process.”<sup>190</sup> Following from this conclusion is the inference that by granting telecommunications carriers immunity, and thus dismissing the plaintiffs’ cause of action, the government is depriving the plaintiffs of a property interest without due process.<sup>191</sup>

Finally, the FISA Amendment Act of 2008 also raises due process concerns because of the potential harsh procedures surrounding case dismissal.<sup>192</sup> Opponents of the immunity legislation have been especially critical of the procedure for disclosing and reviewing the information under the Act.<sup>193</sup> In particular, 50 U.S.C. § 1885a limits review of government

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<sup>185</sup> MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 16.

<sup>186</sup> *Id.* at 18. In their reply brief to the government and communications carriers’ motion to dismiss, plaintiffs offered harsh criticism of the defendants’ characterizations of the law. *Id.* (“The lulling assurances and artfully inaccurate descriptions deployed by the government and the carriers cannot conceal that under [50 U.S.C.A. § 1885a] the Court . . . is prohibited from independently determining the facts.”).

<sup>187</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 22 (“Plaintiffs have a liberty interest in their constitutional right to be free from unreasonable searches and . . . Plaintiffs cannot be deprived of these constitutional liberties without due process.”).

<sup>188</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (holding that an employee had a right to an adjudicatory proceeding regarding a claim under the Fair Employment Practice Act).

<sup>189</sup> *Id.* at 429–30.

<sup>190</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 22.

<sup>191</sup> *See id.* at 22.

<sup>192</sup> MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 16 (“by limiting review of the correctness of those findings to application of the deferential ‘substantial evidence’ standard of review, [50 U.S.C.A. § 1885a] violates due process.”).

<sup>193</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 27 (“The Attorney General has invoked the secrecy provisions of [50 U.S.C.A. § 1885a(c)] here, thereby seeking to have

materials to an in camera ex parte setting if the Attorney General declares that disclosure “would harm the national security of the United States . . . .”<sup>194</sup> The argument follows that such procedure does not give the plaintiff the fair opportunity to evaluate and rebut the government’s dismissal motion.<sup>195</sup> The plaintiffs cite a variety of Supreme Court cases, including *Hamdi v. Rumsfeld*, to support the concept that the plaintiff must receive meaningful notice and information regarding the government’s argument for dismissal.<sup>196</sup>

In summary, opponents of the telecommunication immunity amendment to FISA have raised a variety of arguments. The plaintiffs in the telecommunication litigation claim that the FISA Amendment Act of 2008 violates the Constitution on multiple grounds.<sup>197</sup> The basic attacks on the Amendment are that it unconstitutionally (1) denies plaintiffs’ First and Fourth Amendment claims, (2) violates separation of powers, (3) and denies due process.

#### V. TAKING A STAND: WHY TELECOMMUNICATIONS IMMUNITY IS CONSTITUTIONAL

The opponents’ arguments against telecommunication immunity and the Amendment to FISA clearly raise various questions. Has Congress, by granting immunity, given the Executive too much power, and in turn, reduced accountability for the TSP? There is little doubt that FISAAA has shifted the balance of power regarding telecommunication litigation toward the Executive Branch. Nevertheless, this does not necessarily mean that telecommunication immunity is unconstitutional. Examining the arguments of the government, telecommunication carriers, and applicable federal court decisions sheds further light on the controversy. Additionally, Judge Walker has recently issued an order for the Northern District of California dismissing the telecommunications cases and finding the FISAAA constitutional.<sup>198</sup>

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the Court dismiss plaintiffs’ actions while keeping secret from plaintiffs the supporting factual basis and legal grounds for the certifications. These secrecy provisions violate due process.”).

<sup>194</sup> 50 U.S.C.A. § 1885a(c) (West 2008).

<sup>195</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at 27.

<sup>196</sup> *Id.* at 28; *see Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that an “enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker”).

<sup>197</sup> MDL Plaintiffs’ Opposition, *supra* note 146, at ii–iii.

<sup>198</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 949 (N.D. Cal. 2009).

Confronting such sources, as well as returning to the language of the Amendment itself, ultimately leads to the conclusion that the FISA Amendment Act of 2008 does not violate the Constitution, and accordingly, the federal courts should dismiss the cases against the telecommunications industry.

### *A. Denial of First and Fourth Amendment Claims*

As noted above, one of the plaintiffs' primary challenges to FISAAA is that in granting telecommunication immunity, Congress and the Attorney General are denying the plaintiffs their First and Fourth Amendment claims.<sup>199</sup> Such an argument, however, fails to differentiate between available actions as a whole, and actions against a particular private defendant.<sup>200</sup> After viewing Supreme Court precedent, it is clear that FISAAA merely limits, and does not deny, the First and Fourth Amendment claims of potential plaintiffs.

The Supreme Court has held that Congress is allowed to limit remedies regarding constitutional rights.<sup>201</sup> For example, in *Anniston* the Court upheld procedures (which allowed redress against the government and not a specific state actor) placed on a taxpayers' attempt to challenge the constitutionality of a tax statute.<sup>202</sup> Additionally, in *Bush v. Lucas*, the Supreme Court made clear that Congress has the ability, through statute, to adjust remedies of constitutional violations.<sup>203</sup> The Court concluded in *Bush*, "When Congress

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<sup>199</sup> See *supra* Part IV.A.

<sup>200</sup> See Brief of Telecommunications Carrier Defendants in Support of the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, No. M:06-cv-01791-VRW, (N.D. Cal. filed Nov. 5, 2008) at 4–5 [hereinafter Brief of Telecommunications Carrier Defendants] ("When, as here, Congress merely limits remedies against particular private defendants alleged to have participated in unconstitutional government action, there is no constitutional problem."); Corrected United States' Reply in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, No. M:06-cv-01791-VRW (N.D. Cal. Dec. 2, 2008) at 4 [hereinafter Corrected United States' Reply] ("[50 U.S.C.A. § 1885a] . . . merely precludes Plaintiffs from seeking remedies for alleged constitutional violations from a certain group of private entities . . .").

<sup>201</sup> See *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 343 (1937) ("[S]ubstitution of an exclusive remedy directly against the Government [for a constitutional claim against a particular state actor] 'is not an invasion of [a] constitutional right.'").

<sup>202</sup> *Id.* at 342–43.

<sup>203</sup> 462 U.S. 367, 378 (1983). The Court in *Bush* held that it would be inappropriate for the Court to substitute a remedy for First Amendment claims when Congress had already established procedure for granting remedy. *Id.* at 390.

provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised."<sup>204</sup>

Because Congress has the right to limit remedies regarding constitutional rights, the FISA Amendment Act of 2008 does not unconstitutionally deny potential plaintiffs' First and Fourth Amendment claims. FISAAA grants immunity from lawsuits to a specific set of potential private defendants.<sup>205</sup> As required in *Bush*, Congress clearly expressed its intent, along with the procedures that must be implemented, to grant telecommunications companies immunity for their involvement in the TSP.<sup>206</sup> Furthermore, as both the government and telecommunications carriers point out, potential relief has not been denied to the plaintiffs, as the plaintiffs have already filed actions against the government for the same factual background.<sup>207</sup> Thus, all the FISA Amendment Act of 2008 has done is to require plaintiffs to seek redress from the government itself, something the Supreme Court has consistently allowed Congress to do through lawmaking.<sup>208</sup>

In response to the defendants' arguments regarding the First and Fourth Amendment claims, plaintiffs argue that potential action against the government is not enough to make FISAAA constitutional.<sup>209</sup> Plaintiffs specifically claim that the action against the telecommunications carriers is unique because it was their action, not the government's, which infringed on customers' rights.<sup>210</sup> Such an argument fails to recognize the interdependency of the actions for which the plaintiffs seek remedy. Telecommunications companies can only seek immunity for actions that they

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<sup>204</sup> *Id.* at 378.

<sup>205</sup> See 50 U.S.C.A. § 1885a (West 2008) (including those who assisted the government in intelligence gathering "designed to detect or prevent a terrorist attack" and received certification from the Attorney General).

<sup>206</sup> See *Bush*, 462 U.S. at 378; see also 50 U.S.C.A. § 1885a.

<sup>207</sup> Brief of Telecommunications Carrier Defendants, *supra* note 200, at 4 ("Plaintiffs filed a new lawsuit seeking relief against government actors for alleged constitutional violations . . . . Plaintiffs themselves represent that *Jewel* "raises identical legal questions [as the cases against the carriers]"); Corrected United States' Reply, *supra* note 200, at 4 ("Plaintiffs in several cases consolidated in this MDL proceeding have sued Government defendants.").

<sup>208</sup> See *Bush*, 462 U.S. at 378.

<sup>209</sup> MDL Plaintiffs' Reply Briefs, *supra* note 147, at 5 ("Only relief against the carriers can deter such future constitutional violations.").

<sup>210</sup> *Id.* ("Plaintiffs' claims are aimed at what the carriers did, not at what the government did.").

performed at the behest of the government.<sup>211</sup> If such actions were not directed by the government, they do not qualify under FISAAA.<sup>212</sup> Thus, to claim that seeking relief from the government would not satisfy the unique claim against telecommunications companies seems to ignore the clear requirements for immunity.

Congress, through FISAAA, limited plaintiffs' potential relief from one specific private group, and did not deny a constitutional claim. The plaintiffs in the telecommunications litigation cases have already filed causes of action against the government based on the same factual circumstances.<sup>213</sup> Therefore, in the area of First and Fourth Amendment claims, FISAAA meets constitutional standards that the Supreme Court has provided.

### B. Separation of Powers

Opponents of FISAAA also challenge the law's constitutionality on separation of powers grounds.<sup>214</sup> In particular, plaintiffs claim that FISAAA violates separation of powers by shifting lawmaking powers from Congress to the executive branch and by taking decision making power away from the judicial branch.<sup>215</sup> After examining Supreme Court precedent in combination with the language and structure of the FISA Amendment Act of 2008, these claims prove unconvincing.

The FISA Amendment Act of 2008 does not give the Attorney General law-making power.<sup>216</sup> In order to grant telecommunication immunity to those

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<sup>211</sup> See 50 U.S.C.A. § 1885a(a)(4)(a) (West 2008) (stating that telecommunication immunity is only allowed if action was taken "in connection with an intelligence activity involving communications," and was "authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007.").

<sup>212</sup> *Id.*

<sup>213</sup> See *Jewel v. NSA, et al.*, No. 08-cv-4373 (N.D. Cal. filed Sept. 18, 2008); see also *Jewel v. NSA*, Electronic Frontier Foundation, <http://www EFF.org/cases/jewel> ("In *Jewel v. NSA*, EFF is suing the NSA and other government agencies on behalf of AT&T customers to stop the illegal, unconstitutional, and ongoing dragnet surveillance of their communications and communications records."). In *Jewel*, EFF is basing its claim on documents that a former AT&T employer provided. *Id.* These documents reveal that AT&T provided information to the NSA. *Id.* Importantly, EFF admits that the "same evidence is central" to the claim against telecommunications companies. *Id.* Such an admission casts doubt on the plaintiffs' contention that the two lawsuits are really dealing with unique actions and separate harm.

<sup>214</sup> See *supra* Part IV.B.

<sup>215</sup> *Id.*

<sup>216</sup> See Brief of Telecommunications Carrier Defendants, *supra* note 200, at 10–11. Counsel for the telecommunications carriers argues that under the FISA Amendment Act



who assisted in the TSP, the Attorney General must certify that a number of criteria are met.<sup>217</sup> Specifically, for the Attorney General to grant immunity, assistance must have (1) taken place during the time frame of the terrorist surveillance program, (2) been “designed to detect or prevent a terrorist attack . . . against the United States,” and (3) been the “subject of a written request or directive” from a high ranking intelligence community official.<sup>218</sup> All of these factors lead to the conclusion that Congress intended not to give lawmaking authority, but instead to allow the Attorney General to act under a specific set of circumstances.<sup>219</sup>

Supreme Court precedent also supports the power of Congress to enact legislation such as FISAAA.<sup>220</sup> In claiming that the amendment violated separation of powers, plaintiffs relied heavily on *Clinton*.<sup>221</sup> Nevertheless, the power conferred by the FISAAA is a long cry from the power of a line item veto.<sup>222</sup> The Supreme Court has allowed Congress to delegate various types of decisions to administrative agencies.<sup>223</sup> As stated in *Yakus v. United States*:

The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation. . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained . . . a designated administrative agency, it directs that its statutory command shall be effective.<sup>224</sup>

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of 2008 “the Attorney General plays a traditional executive role, not a legislative one.” *Id.* at 11.

<sup>217</sup> 50 U.S.C.A. § 1885a(a)(4) (West 2008).

<sup>218</sup> *Id.*

<sup>219</sup> Brief of Telecommunications Carrier Defendants *supra* note 200, at 11 (“Congress decided on and enacted the legal standards; the Attorney General is given the power to make a factual demonstration to the courts when he believes the standards have been satisfied.”).

<sup>220</sup> See *Yakus v. United States*, 321 U.S. 414, 424–25 (1944) (describing the appropriate role of the legislature).

<sup>221</sup> See *supra* Part IV.B.

<sup>222</sup> See Corrected United States’ Reply *supra* note 200, at 10–11 (“The Line Item Veto Act gave the President ‘unilateral power’ to effectively *eliminate* provisions of statutory law . . . [t]he Attorney General’s role under the [FISA Amendment] is limited to providing a certification setting forth a narrow set of facts necessary to implement a policy decision already made by Congress.”).

<sup>223</sup> *Id.* at 11–12.

<sup>224</sup> *Yakus*, 321 U.S. at 424–25 (holding that Congress had appropriately exercised its legislative power in enacting the Emergency Price Control Act); see also *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by

In passing the FISA Amendment Act of 2008, Congress was doing nothing more than establishing “basic conditions of fact” by which the Attorney General could grant immunity.

Furthermore, the FISA Amendment Act of 2008 does not unconstitutionally remove decision making power from the judiciary.<sup>225</sup> Plaintiffs’ contention that FISAAA violates Article III can be rejected in two ways. First, Congress does not infringe on judicial fact-finding authority when it amends a law on which a claim is based.<sup>226</sup> Although the Supreme Court did hold in *Klein* that Congress could not “prescribe a rule for the decision of a cause in a particular way,”<sup>227</sup> the Court has clarified this holding.<sup>228</sup> Specifically, the Court has allowed Congress to amend law that influences a cause of action without infringing on judiciary function.<sup>229</sup> Additionally, circuit courts have frequently held that separation of powers analysis does not change simply because Congress creates a statutory defense to litigation.<sup>230</sup> By enacting FISAAA, Congress has simply amended FISA law to create a statutory defense to a cause of action.<sup>231</sup> Therefore, under current precedent, this would not be enough to invoke *Klein*.<sup>232</sup>

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legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”); Corrected United States’ Reply, *supra* note 200, at 12.

<sup>225</sup> See Corrected United States’ Reply, *supra* note 200, at 6; Brief of Telecommunications Carrier Defendants, *supra* note 200, at 14 (“Plaintiffs likewise err in suggesting that [50 U.S.C.A. § 1885a] impinges on the judicial function by purportedly forbidding ‘the Court from engaging in independent fact-finding.’”).

<sup>226</sup> Corrected United States’ Reply, *supra* note 200, at 6 (“The Supreme Court has repeatedly made clear that nothing in Article III forbids Congress from enacting new law or amending the law applicable to a pending cause of action . . .”).

<sup>227</sup> 80 U.S. at 146.

<sup>228</sup> Corrected United States’ Reply *supra* note 200, at 6 (“The Supreme Court has repeatedly made clear that nothing in Article III forbids Congress from enacting new law or amending the law applicable to a pending cause of action, even if that action has been resolved by a trial court and awaits a ruling by an appellate court.”).

<sup>229</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992) (“Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress ‘amend[s] applicable law.’”); Corrected United States’ Reply, *supra* note 200, at 6.

<sup>230</sup> Corrected United States’ Reply, *supra* note 200, at 7 (“In numerous cases, the courts have held that a change in applicable substantive law does not violate the separation of powers even though Congress has affected an existing cause of action . . .”).

<sup>231</sup> See 50 U.S.C.A. § 1885a (West 2008).

<sup>232</sup> Corrected United States’ Reply, *supra* note 200, at 6.

Second, the FISA Amendment Act of 2008 does allow for judicial determination.<sup>233</sup> While the Attorney General makes the initial certification choice, the courts must determine whether such certification is “supported by substantial evidence provided to the court . . .”<sup>234</sup> Opponents of telecommunication immunity argue that the “substantial evidence” standard is too weak to prevent the conclusion that FISA has stripped fact-finding authority from the judiciary.<sup>235</sup> Nevertheless, just because a standard is deferential does not mean the courts have no fact-finding role.<sup>236</sup> The Supreme Court and the circuit courts have indicated that a separation of powers problem only occurs when Congress has “left the court no adjudicatory function to perform.”<sup>237</sup> In the current situation, FISA does leave the courts with an “adjudicatory function,” although a deferential one.<sup>238</sup>

Based on the language of the FISA Amendment and the rulings of federal courts, the contention that the statute violates separation of powers is flawed. Congress is entitled to amend laws and influence causes of action, and the statute does place the judiciary in a position of judicial review.<sup>239</sup> Thus, after discarding separation of powers, the remaining plaintiff claim against the FISA Amendment Act of 2008 rests on due process grounds.

### C. Due Process

Opponents of telecommunication immunity also claim that the FISA Amendment Act of 2008 violates due process.<sup>240</sup> In particular, the plaintiffs argue that through telecommunication immunity they are being denied their

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<sup>233</sup> 50 U.S.C.A. § 1885a(b) (“A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section.”).

<sup>234</sup> *Id.*

<sup>235</sup> See MDL Plaintiffs’ Opposition, *supra* note 146, at 22.

<sup>236</sup> Brief of Telecommunications Carrier Defendants, *supra* note 200, at 14 (“Plaintiffs ignore decades of law recognizing that courts perform a judicial function when they review executive branch determinations under deferential standards.”).

<sup>237</sup> *United States v. Sioux Nation of Indians*, 448 U.S. 371, 392–94 (1980) (holding that Congress had not overstepped its legislative power in allowing the Court of Claims jurisdiction over an Indian Claims Commission’s decision); see also Brief of Telecommunications Carrier Defendants, *supra* 200 note, at 15.

<sup>238</sup> See 50 U.S.C.A. § 1885a(b) (West 2008).

<sup>239</sup> See *id.* § 1885a(b).

<sup>240</sup> See *supra* Part IV.C; MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 16.

property interest in a cause of action without the due process of law.<sup>241</sup> Nevertheless, despite the potential surface appeal of the due process arguments of the plaintiffs,<sup>242</sup> the due process challenge is ultimately misleading. Turning to Supreme Court precedent, as well as focusing on the language and requirements of the FISA Amendment Act of 2008, dispels any due process concerns.

First, it is important to note that due process is a flexible doctrine and not a rigid standard.<sup>243</sup> The telecommunications litigation plaintiffs assert the claim that due process requires an “impartial adjudicator” who can review the evidence and then “decide all the facts and law relevant to the deprivation of their property interests.”<sup>244</sup> Nevertheless, in applying such a standard to telecommunication immunity, the plaintiffs underestimate the flexibility of due process.<sup>245</sup> As recently as 2005, the Supreme Court, in finding that an Ohio prison classification system provided sufficient process, emphasized that “the requirements of due process are flexible and call for such procedural protections as the particular situation demands.”<sup>246</sup> Thus, in applying due process, the Court has avoided laying out any rigid set of rule for its evaluations.<sup>247</sup>

The FISA Amendment Act of 2008 does contain the procedural protections that due process requires.<sup>248</sup> As noted above, in order to obtain

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<sup>241</sup> MDL Plaintiff’s Opposition, *supra* note 146, at 22 (“Plaintiffs have a liberty interest in their constitutional right to be free from unreasonable searches and . . . [p]laintiffs cannot be deprived of these constitutional liberties without due process.”); *see also supra* Part IV.C.

<sup>242</sup> *See* MDL Plaintiffs’ Reply Briefs, *supra* note 147, at 16; MDL Plaintiff’s Opposition, *supra* note 146, at 22.

<sup>243</sup> *See* Brief of Telecommunications Carrier Defendants, *supra* note 200, at 16 (“Plaintiffs are receiving all that due process requires—‘a hearing before an impartial adjudicator empowered to receive evidence and argument and to decide all the facts and law relevant to’ their claims.”).

<sup>244</sup> MDL Plaintiff’s Opposition, *supra* note 146, at 23.

<sup>245</sup> *See* Corrected United States’ Reply, *supra* note 200, at 16 (arguing through application of Supreme Court precedent that “[t]he requirements of due process are ‘flexible’”); *see also* Brief of Telecommunications Carrier Defendants, *supra* note 200, at 17.

<sup>246</sup> *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (internal citation omitted); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.”).

<sup>247</sup> *Wilkinson*, 545 U.S. at 224.

<sup>248</sup> *See* Brief of Telecommunications Carrier Defendants, *supra* note 200, at 17 (“Although [telecommunication immunity] provides for some deference to the Executive,

telecommunication immunity, an attorney general must provide certification that undergoes a process of judicial review.<sup>249</sup> Under FISAAA, the district court will not give immunity effect unless the certification is “supported by substantial evidence provided to the court pursuant to this section.”<sup>250</sup> Such a standard is no doubt deferential to the Attorney General’s decision, but it still provides an opportunity for an unbiased review and decision-making process.<sup>251</sup> As was the case in addressing separation of powers,<sup>252</sup> the Supreme Court has allowed deferential standards, such as substantial evidence.<sup>253</sup> Furthermore, in areas involving national security, courts have been increasingly willing to find deferential standards to be appropriate.<sup>254</sup>

Finally, even if the rationale behind plaintiffs’ due process claim had greater merit, the property interest argument of the plaintiffs is highly questionable.<sup>255</sup> Recall that the plaintiffs claimed that their cause of action

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the statute permits the Court to make a meaningful, independent assessment of the facts at issue.”)

<sup>249</sup> 50 U.S.C.A. § 1885a(b) (West 2008).

<sup>250</sup> *Id.* In essence the plaintiffs’ due process argument is similar to the separation of powers claim. Both arguments are trying to say that the substantial evidence standard is too deferential and should be replaced with de novo review. *See* Corrected United States’ Reply, *supra* note 200, at 16 (“Plaintiffs’ due process argument boils down to an objection to the substantial evidence standard . . . [T]his objection is largely a reprise of Plaintiffs’ separation of powers challenge . . . .”); Brief of Telecommunications Carrier Defendants, *supra* note 200, at 16 (“Plaintiffs’ complaint reduces to the claim that [50 U.S.C.A. § 1885a’s] ‘substantial evidence’ standard is unconstitutional.”).

<sup>251</sup> Brief of Telecommunications Carrier Defendants, *supra* note 200, at 17 (“[I]t is this Court, not the Attorney General, that adjudicates whether the requirements . . . are met.”). Senator Rockefeller, on the Senate floor, made clear that in passing the FISA Amendment Act, Congress was reserving the courts an “important role in determining whether statutory requirements for liability protection have been met.” 154 CONG. REC. S6383 (daily ed. July 8, 2008) (statement of Sen. Rockefeller).

<sup>252</sup> *See supra* Part V.B.

<sup>253</sup> *See, e.g.,* Richardson v. Perales, 402 U.S. 389, 401 (1971) (exploring the legislative intent and judicial approach to a substantial evidence standard with regard to a Social Security claim).

<sup>254</sup> Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) (emphasizing, in evaluating a TSP claim, that courts “need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive”); *see also* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Brief of Telecommunications Carrier Defendants, *supra* note 200, at 18. Based on this general deference, plaintiffs’ due process arguments regarding ex parte in camera proceedings are also unavailing because of the potential sensitive nature of classified information in question. *See* 50 U.S.C.A. § 1885a(c) (West 2008).

<sup>255</sup> Corrected United States’ Reply, *supra* note 200, at 13.

was a property interest, based on the notion from *Logan* that a “cause of action is a species of property.”<sup>256</sup> Such an assessment, however, fails to acknowledge the narrowness of *Logan*. Specifically, *Logan* noted that government, consistent with the due process clause, “remains free to create substantive defenses or immunities for use in adjudication or to eliminate its statutorily created causes of action altogether.”<sup>257</sup> In this case, what Congress did was create a statutory defense to a cause of action.<sup>258</sup> Thus, under *Logan*, one could argue that while a property right interest may have been taken from the plaintiffs, it was not in violation of due process.<sup>259</sup>

Federal court precedent, along with the arguments of the government and telecommunication defendants, displays that FISAAA is constitutional. Plaintiffs’ arguments ultimately fail for a number of reasons. Among these reasons are Congress’s ability to limit causes of action and the FISA Amendment’s process for judicial review of the Attorney General’s certification decision. Therefore, the federal court system should dismiss the current lawsuits against telecommunications companies because of the requirements of the FISA Amendment Act of 2008.

#### D. Judge Walker’s Order

On June 3, 2009 the federal court system took its first major stride in deciding the constitutionality of FISAAA.<sup>260</sup> Judge Walker, writing for the Northern District of California, issued an order dismissing the lawsuits against the telecommunications companies that assisted in the TSP.<sup>261</sup> In doing so, Judge Walker went through the plaintiffs’ various constitutional challenges to FISAAA and ultimately held that the legislation was constitutional.<sup>262</sup>

The court swiftly rejected the plaintiffs’ First and Fourth Amendment arguments.<sup>263</sup> In finding the plaintiffs’ arguments unavailing, the order focused on the narrow “focused immunity” that Congress granted in the

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<sup>256</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

<sup>257</sup> *Id.* at 432.

<sup>258</sup> Furthermore, as addressed earlier in Part V.A, plaintiffs remain free to seek a cause of action against the government for the actions of the TSP.

<sup>259</sup> Corrected United States’ Reply, *supra* note 200, at 13–14.

<sup>260</sup> EFF and ACLU Planning to Appeal, *supra* note 61.

<sup>261</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009).

<sup>262</sup> *Id.* at 960–75. Judge Walker also rejected the plaintiffs’ claims that the Attorney General’s certification, which led to the government’s motion to dismiss, was inadequate. *Id.* at 975–76.

<sup>263</sup> *Id.* at 961 (“The court finds no merit in this argument.”).

FISAAA.<sup>264</sup> The court stated that Congress acted without “interpret[ing] the Constitution or affect[ing] plaintiffs’ underlying constitutional rights.”<sup>265</sup> The court further determined the plaintiffs’ argument to be an overreaction because of the confined scope of FISAAA.<sup>266</sup> Specifically, the court cited section 802(a)(4) to note that immunity is not available for actions authorized by the President after January 17, 2007.<sup>267</sup>

The court found the separation of powers arguments to be the closest issues that the case presented.<sup>268</sup> Judge Walker first addressed the issue, under *Klein*, of whether through telecommunication immunity Congress impermissibly forced the judiciary to make factual determinations in a particular manner.<sup>269</sup> After reviewing *Klein* and its progeny, the court decided that the ultimate issue was whether Congress had really directed factual findings or simply “changed the underlying law.”<sup>270</sup> Ultimately, the court determined the latter to be the case, stating, “Congress created a new, narrowly-drawn and ‘focused’ immunity within FISA, thus changing the underlying law in a ‘detectable way.’”<sup>271</sup> Therefore, the order held there was no separation of powers violation under *Klein*.<sup>272</sup>

The Northern District of California also addressed the non-delegation component of plaintiffs’ separation of powers challenge.<sup>273</sup> In reviewing this issue, Judge Walker described a delicate balance. On the one hand, the court noted that FISAAA established a system of immunity that did not establish a clear basis “for [the Attorney General’s] exercise of discretion.”<sup>274</sup> Nevertheless, the court also recognized that congressional delegations of

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<sup>264</sup> *Id.* On a related note, even the EFF recognized in their press release following Judge Walker’s order that opponents retained the ability to challenge FISA even in the face of telecommunication immunity. EFF and ACLU Planning to Appeal, *supra* note 61. Specifically, the EFF announced, “Judge Walker left the door open to accountability for the government, holding that ‘plaintiffs retain a means of redressing the harms alleged in their complaints by proceeding against government actors.’” *Id.*

<sup>265</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 961.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*; see also 50 U.S.C.A. § 1885a(a)(4) (West 2008).

<sup>268</sup> See *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 970–71.

<sup>269</sup> *Id.* at 961–64 (citing *Klein*, 80 U.S. at 146).

<sup>270</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 963.

<sup>271</sup> *Id.* at 964 (internal citations omitted).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* Judge Walker specifically mentioned that the issue of non-delegation of lawmaking authority was “the most serious of plaintiff’s challenges.” *Id.*

<sup>274</sup> *Id.*

authority to administrative agencies are common.<sup>275</sup> Ultimately, the order held that § 802 of FISAAA did not violate the Constitution.<sup>276</sup> Once again, the court focused on the narrow nature of the immunity, stating, “Section 802 is not a broad delegation of authority to an administrative agency . . . rather, its subject matter is intentionally narrow or ‘focused’ in scope.”<sup>277</sup>

Finally, Judge Walker’s order rejected any potential due process challenges to FISAAA.<sup>278</sup> The court held that plaintiffs’ argument that they were being denied a property interest without due process of law was “without merit.”<sup>279</sup> Specifically, the court stressed that under FISAAA “[t]he Attorney General, in submitting the certifications, is acting pursuant to and in accordance with that congressional grant of authority, in effect, to administer the newly-created immunity provision.”<sup>280</sup> Citing *Logan*, the order held that Congress had authority to provide a defense to a statutory cause of action, and that in choosing to provide such a defense with FISAAA, the requirements of due process were satisfied.<sup>281</sup> The court also rejected any claim that secrecy provisions within FISAAA, allowing for in camera and ex parte review of evidence, violates due process.<sup>282</sup> The court noted, “Given the special balancing that must take place when classified information is involved in a proceeding, the court is not prepared to hold that the Constitution requires more process than section 802 provides in the circumstances of this case.”<sup>283</sup>

Accordingly, the United States Court for the Northern District of California held that the FISA Amendment Act of 2008 was constitutional and granted the defendants’ motion to dismiss the telecommunication immunity suits.<sup>284</sup> Nevertheless, Judge Walker’s order will not be the final say on the constitutionality of FISAAA. Both the EFF and ACLU have already made

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<sup>275</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 964.

<sup>276</sup> *Id.* at 970–71.

<sup>277</sup> *Id.* at 970.

<sup>278</sup> *Id.* at 972.

<sup>279</sup> *Id.* at 971.

<sup>280</sup> *Id.*

<sup>281</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 971 (citing *Logan*, 455 U.S. at 435 (holding that when Congress chooses to provide an immunity defense it is “the legislative determination [that] provides all the process that is due”)).

<sup>282</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 972; see also 50 U.S.C.A. § 1885a(c) (West 2008).

<sup>283</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 972.

<sup>284</sup> *Id.* at 976 (“For the aforesated reasons, the United States’ motion to dismiss (Doc. # 469) [is granted].”).



clear their intentions to appeal Judge Walker's decision to the Ninth Circuit.<sup>285</sup> Thus, the federal court battle over FISAAA's constitutionality has only just begun.

## VI. WHERE TO GO FROM HERE

Regardless of what the federal courts ultimately decide regarding the constitutionality of the FISA Amendment Act of 2008,<sup>286</sup> an obvious question remains: what is next? If the FISA Amendment Act of 2008 is found unconstitutional, the litigation against telecommunications carriers will continue, and the other two branches of the federal government will have to decide whether to respond.<sup>287</sup> In the more likely event that FISAAA is upheld,<sup>288</sup> opponents of the TSP will still have claims to pursue against the government in seeking redress.<sup>289</sup> Nevertheless, the window for judicial

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<sup>285</sup> On the day Judge Walker made the order public, EFF issued a press release stating its intentions to appeal the decision. EFF and ACLU Planning to Appeal, *supra* note 61. Cindy Cohn, legal director of EFF, expressed disappointment with the ruling, and reaffirmed her belief in the plaintiff's basic arguments, stating, "The retroactive immunity law unconstitutionally takes away Americans' claims arising out of the First and Fourth Amendments, violates the federal government's separation of powers as established in the Constitution, and robs innocent telecom customers of their rights without due process of law." *Id.*

<sup>286</sup> At the time of this Note, EFF and the ACLU are beginning the process of appealing Judge Walker's order to the Ninth Circuit. *Id.* Kurt Opsahl, the Senior Staff Attorney for EFF, has already expressed hope that the Ninth Circuit will "stand up for the Constitution, and reverse [Judge Walker's] decision." *Id.*

<sup>287</sup> Presuming the FISA Amendment Act of 2008 is unconstitutional, it is unclear how Congress or the Obama Administration would respond. While Congress ultimately did support the bill, the Democratic Party was split in responding to pressure from the Bush Administration. *See supra* Part III. Because President Obama was reluctant in ultimately supporting the bill, observers might not expect the current administration to push for revised telecommunication immunity law. *See Risen, supra* note 12. Nevertheless, the Obama Administration has recently publicly supported telecommunication immunity, asking Judge Walker to uphold the FISA Amendment Act of 2008 and dismiss the lawsuits. Bob Egelko, *Obama Administration Backs Telecommunication Immunity*, S.F. CHRON., Feb. 27, 2009, at B8 ("The Obama administration has asked a federal judge in San Francisco to uphold a law aimed at dismissing suits against telecommunications companies that cooperated with President George W. Bush's wiretapping program."). While beyond the scope of this Note, one must also wonder whether, under the current economic climate, the government would be willing to expose the telecommunication industry to the potential liability that this series of civil suits could entail.

<sup>288</sup> *See supra* Part V.

<sup>289</sup> *See, e.g., Jewel v. NSA*, No. 08-cv-4373 (N.D. Cal. Sept. 18, 2008) (civil liberties claim against the government for the actions of the TSP).

action against the telecommunications companies will close, unless opponents of the TSP can convince Congress to change its legislation.

Perhaps, however, the more interesting inquiry is what should be next. To this normative question, I respond with a simple suggestion: nothing. In other words, the FISA Amendment Act of 2008 provides a moment for each side of the debate to reflect rather than react. Such a response would no doubt anger many, especially those who believe that the government and its helpers should be held responsible for the surveillance actions they took following September 11.<sup>290</sup> Nevertheless, such anger would be short sighted and fail to take into account what has truly occurred in the wiretapping controversy to this point. Specifically, each side of the battle has victories to be proud of and can look positively at the FISA Amendment Act of 2008.

Looking back upon the TSP and the events that led to the program, supporters of the TSP and telecommunication immunity have obvious reasons to celebrate the passage of FISAAA. After the events of September 11, 2001, President Bush made national security a primary focus of his administration.<sup>291</sup> President Bush himself admitted this was his justification for authorizing the surveillance program.<sup>292</sup> Once the media discovered the TSP and the assistance telecommunications companies provided, President Bush made it a priority to support electronic surveillance law that included telecommunication immunity.<sup>293</sup> After a long struggle with Congress, the Bush Administration was able to convince Congress to update FISA law and grant immunity to telecommunications companies that had assisted the government.<sup>294</sup> Thus, in the minds of many people, the FISA Amendment

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<sup>290</sup> Opponents of telecommunication immunity were highly outspoken in their negative reaction to the FISA Amendment Act of 2008, seeing the bill's passage as an injustice. See, e.g., *House Caves, Approves Fake 'Compromise' on Telecom Immunity: EFF Condemns House Vote, Looks to Senate for Leadership*, ELECTRONIC FRONTIER FOUNDATION, June 20, 2008, <http://www EFF.org/press/archives/2008/06/20> ("Privacy rights and the rule of law took a serious blow today when the House of Representatives passed blanket retroactive immunity for phone companies that participated in the president's warrantless surveillance program.").

<sup>291</sup> See Bush, *President Radio Address*, *supra* note 25.

<sup>292</sup> *Id.* ("In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency ... to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. ... This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies.").

<sup>293</sup> See *supra* Part III.B.1; see also *Bush Pushes for Telecom Immunity*, *supra* note 94.

<sup>294</sup> See *supra* Part III.

Act of 2008 was one last win for President Bush in the fight for national security.<sup>295</sup>

From a broader, forward-looking perspective, however, opponents of the TSP and telecommunication immunity appear to be the true victors. From the time of its exposure, opponents of the TSP have expressed outrage at its existence.<sup>296</sup> The most avid opponents may not be satisfied until there are ramifications for everyone involved, including the telecommunications companies.<sup>297</sup> Moving away from the extremes, however, three specific developments should provide opponents of the TSP and telecommunication immunity with a sense of victory and hope for the future: (1) the termination of the Terrorist Surveillance Program, (2) a president more sympathetic to civil liberties, and (3) the compromise provisions within the FISA Amendment Act of 2008.

First and foremost, the Terrorist Surveillance Program is no longer in existence. In response to media scrutiny and public pressure the Bush Administration disbanded the TSP, and the government has not reauthorized the program since January of 2007.<sup>298</sup> Thus, much like the warrantless wiretapping of Presidents Richard Nixon and Franklin D. Roosevelt, the warrantless wiretapping of the Bush Administration has been relegated to history. Although the Bush Administration did not admit fault in terminating the program, the practical reality (the program's end) remains the same.<sup>299</sup> Despite negative reactions to President Bush's approach in terminating the program, opponents of the program still celebrated its demise.<sup>300</sup>

Second, opponents of warrantless surveillance and telecommunication immunity now have a more sympathetic White House.<sup>301</sup> While it is true that

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<sup>295</sup> This was the version of the story that Eric Lichtblau of the *New York Times* told upon the Amendment's passing. See Lichtblau & Stout, *supra* note 72.

<sup>296</sup> See, e.g., Baker, *supra* note 24, at A8 ("Congressional Democrats and some Republicans have expressed outrage at the NSA program, saying it contradicts long-standing restrictions on domestic spying and subverts constitutional guarantees.").

<sup>297</sup> See, e.g., *NSA Spying*, ELECTRONIC FRONTIER FOUNDATION, <http://www EFF.org/issues/nsa-spying> (describing how EFF is currently suing both the government and telecommunications companies involved in the TSP, and wants to "hold the government officials behind the program accountable.").

<sup>298</sup> See Gonzales Letter, *supra* note 2.

<sup>299</sup> *Id.*

<sup>300</sup> See, e.g., Editorial, *A Spy Program in From the Cold*, N.Y. TIMES, Jan. 18, 2007, at A26 ("It was good news, then, when the administration announced yesterday that it would now seek a warrant from the proper court for that sort of eavesdropping.").

<sup>301</sup> In the early days of his presidency, President Obama's policies and decisions have garnered mixed reactions from civil liberties organizations. For example, in January, President Obama fulfilled his campaign promise to close Guantanamo Bay, receiving praise from civil liberties organizations. *President Obama Orders Guantanamo Bay*

many opponents of telecommunication immunity criticized President Obama for his ultimate support of the FISA Amendment,<sup>302</sup> Obama is still more likely to be sympathetic to civil liberty concerns in making national security decisions than the past administration. After all, a common message from President Obama, during both his campaign and early in his presidency, has been to “reject as false the choice between our safety and our ideals.”<sup>303</sup> Thus, at least in the short term, any return to TSP type surveillance is highly improbable.

Finally, opponents of telecommunication immunity should still embrace the compromise portions within the Foreign Intelligence Surveillance Act of 2008. Although the Amendment did create telecommunication immunity, it also created a revised FISA system that increases congressional oversight and once again requires Foreign Intelligence Surveillance Courts to review government actions.<sup>304</sup> Furthermore, FISAAA of 2008 explicitly declares that FISA law is the “exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted.”<sup>305</sup> This provision removes any ambiguity as to the lawfulness of

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*Closed and End to Torture*, ACLU, Jan. 22, 2009, <http://72.3.233.244/safefree/detention/38455prs20090122.html> (Caroline Fredrickson of the ACLU stated “President Obama has given America a much-needed and significant break from the Bush administration.”). On the other hand, civil liberties groups still want President Obama to release more Bush Administration secrets to the public. See *Justice Department Releases Bush Administration National Security Memos*, ACLU, Mar. 2, 2009, <http://www.aclu.org/safefree/general/38891prs20090302.html>. Nevertheless, from the perspective of civil liberties organizations, it seems obvious that President Obama is preferred to his predecessor.

<sup>302</sup> See Risen, *supra* note 12, at A14.

<sup>303</sup> President Barack Obama, Inaugural Address (Jan. 20, 2009) (transcript available at <http://www.whitehouse.gov/blog/inaugural-address>).

<sup>304</sup> See Foreign Intelligence Surveillance Act of 1978 Amendment Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (to be codified at 50 U.S.C. § 1801) (providing procedures for both the Foreign Intelligence Surveillance Court and Congress to provide checks on electronic surveillance). Senator Rockefeller stressed that the FISA Amendment Act provides the “district court both an important role in determining whether statutory requirements for liability protection have been met and the tools to make that assessment,” and also requires “a report of the review be submitted to the Congress.” 154 CONG. REC. S6383–S6384 (daily ed. July 8, 2008) (statement of Sen. Rockefeller).

<sup>305</sup> 50 U.S.C.A. § 1812. While the issue of telecommunications immunity overshadowed the exclusivity provision within the FISA Amendment, members of Congress saw the exclusivity provision as an important compromise. See Lichtblau & Stout, *supra* note 72. As Speaker of the House Pelosi commented, the exclusivity provision was an important part of the FISAAA because it states “that the law is the exclusive authority and not the whim of the president of the United States.” *Id.*

future warrantless wiretapping.<sup>306</sup> As Senator Rockefeller stated to the Senate:

[T]he bill tightens the exclusivity of the FISA law, making it improbable for any future President to argue that acting outside of FISA is lawful. That is huge. That means the President can never again, ever use what he has used—his all-purpose powers—and say he can just walk right around the end of FISA.<sup>307</sup>

Thus, barring any change in law, all future electronic surveillance that the Executive branch conducts must undergo the judicial and congressional review that the new FISA law requires.

Neither the Terrorist Surveillance Program nor telecommunication immunity will be the last major battle over electronic surveillance. After all, in implementing the TSP, President Bush was only continuing a tradition of electronic surveillance that began approximately fifty years earlier.<sup>308</sup> With technology constantly advancing, and terrorism still an ever-present threat, there is little doubt that the delicate balance between liberty and security will be tested in the future. Nevertheless, the FISA Amendment Act of 2008 provides a moment to pause for reflection. It presents the rare opportunity for each side of the equation to have some sense of victory, while waiting for future battles to begin.

## VII. CONCLUSION

Since the New York Times uncovered the Terrorist Surveillance Program in December of 2005, the program has been a magnet for controversy. An offshoot of this controversy has been the realization that telecommunications companies played an active role in assisting the government. With civil liberties organizations challenging the actions of telecommunications companies in federal court, President Bush began pressuring Congress to pass reformed FISA law that granted immunity to the telecommunications companies that assisted in the program. Although Congress resisted, it eventually passed the FISA Amendment Act of 2008, which included telecommunication immunity.

It is currently up to the judiciary to decide whether the FISA Amendment Act of 2008 violates the Constitution. Plaintiffs in the telecommunication lawsuits challenge that the Act inappropriately denies them their First and Fourth Amendment claims, violates separation of powers, and denies them

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<sup>306</sup> *See id.*

<sup>307</sup> 154 CONG. REC. S6383 (daily ed. July 8, 2008) (statement of Sen. Rockefeller).

<sup>308</sup> *See supra* Part III.A.

